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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 37

BERNARD McGARRY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Bernard G. McGarry, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit affirming the judgment of conviction entered by the United States District Court for the District of Massachusetts on April 7, 1967.

OPINIONS BELOW

The opinions of the Court of Appeals on original hearing and on petition for rehearing, not yet reported, are printed in Appendix B hereto, *infra,* pp. 3a, 22a. Also printed in Appendix B, as relating to earlier stages of the case, are the opinions of the Court of Appeals in *Lord* v. *Kelley,* 334 F.2d 742 (1st Cir. 1964), *cert. denied,* 379 U.S. 961 (1965), *infra,* p. 24a, and *McGarry's, Inc.* v. *Rose,* 344 F.2d 416 (1st Cir. 1965), *infra,* p. 30a, and the opinions of the District Court for the District of Massachusetts in *Lord* v. *Kelley,* 223 F.Supp. 684 (D. Mass. 1963), *infra,* p. 43a, and *Lord* v. *Kelley,* 240 F.Supp. 167 (D. Mass. 1965), *infra,* p. 36a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1967. Rehearing was denied on February 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under this Court's expressed policy that the determination of the extent to which government wiretapping has tainted the prosecution be made, whenever possible, before trial,

(a) the Department of Justice, knowing of the wiretapping two months before trial and acknowledging an obligation to disclose it, may withhold disclosure until the trial has begun and the jury has been impanelled; and

(b) the trial court may then deny the accused a recess of the trial to prepare for a hearing on the taint

issue and may afford him only a narrowly restricted voir dire examination of one witness, the government wiretapper.

2. Whether, when an aggrieved person has secured the return, by court order under F.R.Crim.P. 41(e), of documents illegally seized by agents of the Internal Revenue Service, those same documents may thereafter be taken again by compulsory process and used in evidence against him in a criminal case.

3. Whether, in an income tax evasion prosecution based on the net worth-expenditures method of proof, when the defense has introduced evidence of a cash gift received prior to the indictment years and the government has introduced evidence, supplied by the taxpayer, of his expenditures during the years following the gift, the court may properly impose upon the defense the burden of proving that other and unknown expenditures did not dissipate the cash before the indictment years and, failing such proof by the defense, whether the court may exclude (a) the testimony of a defense expert as to the effect of the gift upon the opening net worth, and (b) a defense summary chart of the evidence counteracting the government's chart by including the amount of the gift.

STATUTES INVOLVED

The statutory provisions involved are Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605; Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. § 7201; and F.R.Crim.P. Rule 41(e), 18 U.S.C.A. They are printed in Appendix A, *infra*, pp. 1a-2a.

STATEMENT

Introduction

Petitioner was convicted by a jury under 26 U.S.C. § 7201 on all three counts of an indictment charging tax evasion for the years 1959, 1960 and 1961 and was sentenced to imprisonment of five years on each count, to run concurrently, and a fine of $10,000 on each count, for a total of $30,000. R. 358-59.[1]

The Wiretapping

Some months after the indictment, the Department of Justice, through a "review", under its *Schipani* policy,[2] to determine whether "any illegal electronic surveillance may have affected" this case, learned that an Internal Revenue Service wiretapper had intercepted conversations of petitioner allegedly dealing with gambling activities.

When the Justice Department lawyers received this information in January 1967, they were required, first, under the Solicitor General's *Schipani* policy, to disclose the facts to petitioner and, then, under *Nardone* v. *United States,* 308 U.S. 338 (1939), to de-contaminate their case in the ensuing hearing. They determined upon a course which, by cooperation of the trial court, took much of the burden off their shoulders. That course, simply put, was, first, to withhold the information until March 6, when the jury had already been impanelled, and, then, to reveal as little as possible, relying upon the pressure of a waiting jury so to curtail any hearing as to minimize petitioner's oppor-

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[1] The reference "R" is to the printed record appendices below.

[2] Memorandum of the Solicitor General in *Schipani* v. *United States,* No. 504, Oct. Term 1966, U.S. Sup. Ct.

tunity to demonstrate any significant relation between the wiretapping and the evidence against him. Immediately after the jury was impanelled, the prosecutor presented, professedly "in the interests of justice", a memorandum disclosing that two conversations of petitioner, relating to gambling activities, had been overheard in 1963 through a 13-month wiretap on a Miami, Florida, telephone. R. 8, 43, 342-43. The memorandum further stated that no record of the monitored conversations remained in existence and, self-servingly, that "it does not appear" that the tapping was a source of leads to any evidence or that anyone involved in the case on the government side was aware of the tapping before January 1967. R. 343. Supplementing the memorandum, the prosecutor orally stated that he had questioned various named persons in the Boston office of Internal Revenue and was told that they knew nothing of the wiretapping. R. 45.

The trial court's only interest in the fact that the prosecutor had known of the wiretapping for two months was that, since the indictment predated that knowledge, the prosecutor could not consciously have used illegal evidence before the grand jury. R. 45. As for the defense demand that the trial be recessed long enough to permit preparation for a full hearing on the "taint" question, the judge, obviously motivated in large part by the fact that the jury was waiting, gave it short shrift. Over objection, he ordered the hearing to commence at once, declaring that he would decide after hearing the government's first witness whether he needed to hear any further evidence. R. 46-48. "If this fellow does not take very long", said the court, "I am not going to sit around a few days." R. 47. On a defense plea for at least enough time for

counsel to confer with his client about the events to which the witness' testimony would relate, the court granted a five-minute recess. R. 48.

The prosecution then put on its one witness, Owen Burke Yung, whom it had notified a week earlier to be prepared to testify. R. 70. His testimony on direct was a very model of brevity. He said he was a Special Assistant in the Treasury Department's Intelligence Division and that, in the course of his regular duty of listening to tape recordings of conversations intercepted by a year-long wiretap of a telephone in Miami, Florida, he had heard two December 1963 conversations in which petitioner spoke of his interest in gambling "layoff action." He declared, further, that he had made no written report of this information and that the tapes had been erased after he heard them. According to "the best of [Yung's] recollection", he passed the information on to no other person until the Justice Department's *Schipani* inquiry in January 1967. R. 48-52.

On cross-examination, a few more details came out. In 1962-1963, Yung was attached to Internal Revenue's Organized Crime Division, one of whose targets was this petitioner, searching for gambling information to be passed on to the appropriate field office. R. 58-59, 64. In the course of this work, Yung heard about a thousand different voices ir wiretapped conversations. R. 54. The two conversations of petitioner which he had listened to in August of 1963[3] (R. 61) stood out so clearly in his memory that, more than three years later, when the Justice Department's inquiry reached him, he was able to recall, without a tape or any written

[3] Not December, as he had said on direct. R. 49.

memorandum to refresh his recollection, (1) that he had overheard them via the specific Miami wiretap, (2) that petitioner had expressed an intention to "work into some layoff action", and (3) that petitioner had stated the names of "the other parties he wanted to layoff with". Yung even remembered those names. R. 49-50. Yet, on cross-examination, to support his and the prosecution's claim that the wiretapped information had not been passed on to anyone, he insisted that there had been nothing in the petitioner's conversations worth passing on. R. 64-65. Yung admitted that he had frequently talked to Mr. Guiggio of Internal Revenue's Boston field office and that petitioner could often have been a subject of those conversations. R. 58-59, 65-66. Had Yung supplied the tapped information to Guiggio, the latter would not have been aware that it had been illegally obtained, for, as Yung said, "Mr. Guiggio had no knowledge whatever where I obtained my information." R. 66.

To attack the credibility of Yung's testimony that he had nursed to his bosom the tapped information about petitioner's interest in gambling activities, which was the very purpose of his wiretapping, rather than passing it on to the persons preparing a case against petitioner, the defense attempted to inquire into Yung's consciousness of the criminality of his wiretapping. The court, however, blocked such inquiry. R. 56, 69.

Other defense attempts to demonstrate actual or probable connection of the wiretapping to the prosecution's case were similarly frustrated. Objections were sustained to questions about who authorized the wiretapping (R. 52), what other wiretapping Yung had

done (R. 53, 54, 66), what other persons worked on the Miami tap with Yung (R. 56), what other McGarry-related wiretapping had been done in the Boston area (R. 71), and whether there was an I.R.S. policy not to admit wiretapping even to other employees. R. 65.

The defense was permitted to ask who changed the tapes on the recording machine attached to the Miami wiretap, but when Yung attributed that function to a "confidential informant", the court blocked inquiry into the name of the "informant", the source of the money he was paid and the existence of records of payment. R. 68-69.

At a loss for a permissible path of inquiry, defense counsel requested that Yung, rather than being excused, be brought back after the defense had been given "a fair opportunity to investigate his testimony and intelligently try to approach it by way of cross-examination." The request was denied. R. 71-72. In the circumstances, the defense excused Yung and asked for a reasonable time to prepare its own evidence for submission on the voir dire. The court replied that it would confer with counsel about further evidence "at a later date". R. 73.

Thereupon, the jury was called in and the trial began. R. 73. On the third day of the trial the jury was sequestered and, thereafter, the court sat six days a week including Good Friday and the Saturday before Easter. R. 8-12. No further reference was made to the wiretapping matter until the government rested, when the defense referred to it as a basis for a judgment of acquittal, requesting, in support of its motion, that Yung's "confidential informant" be produced for

examination. The court denied the motion and ruled that it was satisfied, on the basis of Yung's testimony alone, that the government's case was not tainted. R. 231-32. At the conclusion of all the evidence, the defense moved for a "voir dire to compel disclosure of identity and attendance" of the "informant". The motion was denied. R. 10, 342.

The jury returned its verdict on March 30, 1967. R. 10. On April 4, 1967, Agent Yung testified before the Subcommittee on Administrative Practice and Procedure of the United States Senate Committee on the Judiciary. On April 6, petitioner moved to defer judgment, attaching a transcript of the Subcommittee hearing. R. 357-58. As appears from that transcript, Yung told the Subcommittee that his so-called "informant" was paid $200 a week and spent eight or ten hours a day listening to and making an index of the tapes. In short, he was a federal employee working as a full-time wiretapper, not a "confidential informant." Characteristically, Yung claimed to have destroyed the Miami employee's written records about a year after the removal of the tap, because he "didn't want them around any more." He admitted, however, that he could not say that the Miami employee had not kept copies of the records. The motion to which this testimony was attached, petitioner's last-ditch attempt to expose the government's illegal conduct to judicial inspection, was denied by the trial court on a finding that Yung's Subcommittee testimony was "substantially identical" to the testimony he had given on voir dire. R. 358.

The Court of Appeals referred to a non-existent[4] government "affidavit that no evidence illegally ob-

[4] See p. 18, *infra*.

tained or 'tainted' or any leads therefrom had been submitted to the Grand Jury or would be used in trial" and held that, although "better practice" would be for the government to disclose the wiretapping "well in advance of trial," petitioner was afforded adequate opportunity "to explore the implications of the tap." App. B, *infra,* pp. 19a-20a. The trial court's failure to make available the Miami wiretapping employee was justified not on the basis that he was a confidential informant, but on the ground of the "predominantly custodial responsibilities of the employee. . . ." *Ibid.*

The Use of Illegally Seized Evidence

A substantial part of the prosecution's evidence consisted of business records of enterprises with which petitioner was associated. App. B, *infra,* p. 16a.

Those papers had originally been taken by I.R.S. agents from petitioner's accountant. In an action, brought by petitioner and others, which Judge Wyzanski characterized as "a pre-indictment pleading under Federal Rule of Criminal Procedure 41(e)", the taking was found to have been illegal and "close to extortion". The papers were ordered returned and the data contained in them suppressed. *Lord* v. *Kelley,* 223 F. Supp. 684 (D. Mass. 1963) (App. B, *infra,* p. 43a). The I.R.S. was obviously less than enthusiastic about the return order. In a subsequent contempt proceeding, Judge Wyzanski found that one of the agents "in wilful defiance" of the order, used certain of the illegally seized records to pursue leads to a number of petitioner's financial transactions. *Lord* v. *Kelley,* 240 F.Supp. 167, 170 (D. Mass. 1965) (App. B, *infra,* p. 36a). Judge Wyzanski's suppression of the illegally

seized records was without prejudice to the government's right to take them again by lawful process. 223 F.Supp. at 690-92 (App. B, *infra,* pp. 51a-53a). Petitioner's appeal from that part of the order was dismissed for want of jurisdiction. *Lord* v. *Kelley,* 334 F.2d 742 (1st Cir. 1964), *cert. denied,* 379 U.S. 961 (1963) (App. B, *infra,* p. 24a). Thereafter, the government issued administrative subpoenas for the returned records and obtained a court order for enforcement of the subpoenas. The court below affirmed the enforcement order, on the authority of this Court's statement in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920), that an originally illegal seizure of records "does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others." *McGarry's, Inc.* v. *Rose,* 344 F.2d 416, 419 (1st Cir. 1965) (App. B, *infra,* p. 30a).

Eventually came petiitoner's indictment and trial. Pretrial motions to suppress the records in question were denied and the records were received in evidence over objection. R. 14-20, 23, 165-79, 350-55. On appeal to the court below from the conviction, petiitoner did not seek to relitigate *McGarry's, Inc.* v. *Rose, supra.* The narrow issue he presented was whether the material illegally seized could, after a new taking, be used against him in a criminal case, an issue not before the Court of Appeals in *McGarry's, Inc.* v. *Rose.* The court, however, adhered to its earlier position. To the contention that its position would permit wholesale violations of the Fourth Amendment, the court replied that the government would "ordinarily seek

to avoid" the delays and risks of illegal seizures. It added:

> "To impose the greater sanction of permanent immunization whenever a seizure of ordinary business and corporate records has been invalidated would place an incommensurate burden on the government unnecessary for the protection of commercial privacy." App. B, *infra,* p. 18a.

The Net Worth Analysis

The government's case was based on a net worth-expenditures analysis. From information petitioner gave the Internal Revenue Service in connection with settlement of tax disputes for earlier years, including net worth statements for the years 1946 through 1954, the government derived a net worth figure as of January 1, 1955. Using that figure as a starting point, the government made a full year-by-year net worth analysis of petitioner's receipts and expenditures for the seven years from 1955 through 1961, on the basis of which it charged him with underreporting his taxable income for each of the last three years of the period. App. B, *infra,* pp. 4a-5a.

Petitioner, by way of defense, introduced evidence that he had received a $300,000 gift from his father in 1950. Petitioner's accountant testified that he had omitted this amount from the net worth statements and other information submitted to the government prior to the 1959-61 tax dispute because, being non-taxable, it was irrelevant to the purpose of those submissions. R. 236. The $300,000 item was, therefore, omitted from the government's calculations. Petitioner's theory was that inserting this figure in the government's calculations would require a revision of the

January 1, 1955 net worth figure which the government had used as the starting point for its tax computations and would result in a determination that there had been no underreporting of taxable income for any of the following years. App. B, *infra*, p. 5a.

The trial court, while it admitted the evidence of the making of the gift, excluded testimony by petitioner's expert to reflect the mathematical consequences of including the $300,000. Moreover, although it received in evidence and sent to the jury the government's chart summarizing all the government arithmetic the jury had heard, the court excluded petitioner's chart showing how the arithmetic would be affected by including the $300,000 item. App. B, *infra*, p. 8a. The prosecution, taking obvious advantage of these rulings, hammered home its own chart in summation and emphasized the absence of a defense chart. R. 324-26. The trial court rejected petitioner's proffers because there was no evidence that the $300,000 had been used for the 1955-1961 expenditures proven by the government. R. 356. The Court of Appeals affirmed the rejection on the somewhat different ground that petitioner had offered no proof that the $300,000 was "on hand" for the tax years. App. B, *infra*, p. 9a. In a petition for rehearing, petitioner argued that the government's own evidence, from which it derived its January 1, 1955, starting figure, contained a demonstration of his expenditures since the time of the alleged gift, so that the jury, if it believed that the gift had been made and that the expenditures were as shown by the government, should have been permitted to receive the demonstration of petitioner's expert that he had not underpaid his taxes. Pet. for Reh., p. 3. To this argument, the Court of Appeals, in a second

opinion, replied that the expenditure figures were supplied to the government by petitioner and, while the government could accept and use them as a basis for computing his opening net worth, he could not use them as evidence that his 1950 cash hoard remained substantially unexpended as of January 1, 1955. App. B, *infra*, p. 23a.

REASONS FOR GRANTING THE WRIT

1. The first two questions presented by this petition spring from lawlessness of government agents in the enforcement of tax laws. Judge Wyzanski adverted to some of that lawlessness as it affected petitioner, *Lord* v. *Kelley*, 240 F.Supp. at 169 (App. B, *infra*, pp. 38a-39a), but the record shows even more.[5] It shows, moreover, that the agents, in their lawlessness, were no respecters of persons. They invited petitioner's lawyer to meetings at their office and, without his knowledge, electronically recorded his statements. R. 333-34. Indeed, when that lawyer first appeared in the case, the agents commenced an Intelligence Division examination of his income tax returns for a six year period. See *O'Donnell* v. *Sullivan*, 364 F.2d 43, 45 (1st Cir. 1966). Not even the courts are beyond the reach of these over-enthusiastic snoopers. Judge Wyzanski stated:

> "More than once the judges of a court have been indirectly reminded that they personally are taxpayers. No sophisticated person is unaware that even in this very Commonwealth the Internal

[5] See, in addition to the matters referred to in the Statement, R. 20-42. See also Hearings Before the *Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, Part 3, 89th Cong., 2d Sess., pp. 1370-1431, 1448-74 (1965).

> Revenue Service has been in possession of facts with respect to public officials which it has presented or shelved in order to serve what can only be called political ends, be they high or low. And a judge who knows the score is aware that every time his decisions offend the Internal Revenue Service he is inviting a close inspection of his own returns. But I suppose that no one familiar with this Court believes that intimidation, direct or indirect, is effective." 240 F.Supp. at 169 (App. B, *infra,* p. 39a).

Judicial self-restraint may, perhaps, deter courts from invading this jungle of I.R.S. lawlessness. Here, however, the Department of Justice has brought the jungle into the courtroom. That circumstance, we submit, calls for exercise of this Court's jurisdiction.

No question need be raised as to whether the government lawyers consciously used wiretapped information for evidence or leads to evidence in preparing the case against petitioner. It is enough that, by their own admission, they withheld the truth about the wiretapping for two months, thereby effectively depriving petitioner of an adequate hearing on the extent of contamination of their case.[6] The hearing requirement dates back to this Court's opinion in *Nardone* v. *United States,* 308 U.S. 338 (1939). It cannot be doubted that the Court, while leaving much to the discretion of the lower courts, directed that the hearing, whenever possible, be held before trial. It said:

> ". . . timely steps must be taken to secure judicial determination of claims of illegality on the part of

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[6] In their memorandum informing the trial court of the wiretapping, the Justice Department lawyers admitted the necessity of a hearing. R. 343.

> agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention." 308 U.S. at 341-42.

In *Jones* v. *United States,* 362 U.S. 257, 264 (1960), extending its *Nardone* policy of pretrial determinations to suppressibility of evidence generally, the Court said:

> "In the interest of normal procedural orderliness, a motion to suppress, under Rule 41(e), must be made prior to trial, if the defendant then has the knowledge of the grounds on which to base the motion. . . . This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt."

Petitioner, of course, could not have moved for a hearing before trial because the Justice Department carefully withheld from him "the grounds on which to base the motion" until the trial had started. If the wiretapping of the government's investigators is indefensible, so also is the procedural trickery of its lawyers. Indeed, the lawyers' conduct is even more unconscionable, for they, as officers of the court, are held to higher standards than prevail in the demimonde of the sleuth. This Court, in defense of its *Nardone* policy, should grant the writ here sought, if only for the opportunity of administering a proper rebuke to the prosecutors in this case. This is so, we submit, apart from any question of the adequacy of the voir dire hearing which was afforded petitioner. The prosecutors must learn that they may not deprive

the accused of pretrial rights and then rely on a conviction to render the impropriety harmless.[7]

2. In addition to the prosecutorial misconduct which deprived petitioner of a pretrial hearing on the taint issue, another question meriting this Court's attention is the adequacy of the voir dire hearing which the court afforded him as a substitute. Just as a restrictive reading of the anti-wiretapping statute, 47 U.S.C. § 605, warranted a second look at the taint problem, lest the policy laid down in the first *Nardone* case[8] be stultified, 308 U.S. at 340, the practice of unduly curtailing hearings on the taint issue warrants, after almost three decades, a third look.

The trial court, as noted in the Statement, refused to recess the trial to afford petitioner a reasonable opportunity to prepare for the taint voir dire, forcing him to hearing five minutes after the colloquy in which the prosecutor made the belated disclosure of the wire-

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[7] Compare *Battle* v. *United States*, 120 U.S. App. D.C. 221, 223, 345 F. 2d 438, 440 (D.C. Cir. 1965), in which the deprivation of pretrial hearing resulted from mere error rather than prosecutorial misconduct. The government there argued that the impropriety could be rectified by a remand for a post-trial hearing, without upsetting the conviction. The Court of Appeals, citing this Court's *Nardone* and *Jones* opinions, held:

> "We think no settled rule has been established that in such a case as this a remand is always to be preferred to a reversal for failure to comply with Rule 41(e). For this court to persist indefinitely in remanding instead of reversing for such error would tend to prevent the rule from operating as intended . . . . The proper sequence is to comply with Rule 41(e) by a hearing before trial as the rule provides. This protects the trial from error and enables the defense at the most appropriate time to obtain a ruling on the usability by the prosecution of important evidence."

[8] *Nardone* v. *United States*, 302 U.S. 379 (1937).

tapping. It limited petitioner to a narrow cross-examination of one witness, the government's wiretapper, Yung. It refused to allow inquiry into any tap other than the one Yung chose to admit or into the question of who authorized and participated in the admitted tap. It refused to permit proper inquiry into Yung's credibility. Worst of all, it tolerated the government's shabby claim that the employee who actually monitored the tape recorder and might have had copies of the documentary records he had made of the intercepted conversations was a "confidential informant" whose identity must be kept secret.

The Court of Appeals, upon grounds demonstrably fallacious, ignored the patent inadequacy of the voir dire proceeding. Whatever justification there may be for relying on a self-serving, conclusory affidavit by government lawyers that they will use no product of the wiretapping in the trial,[9] here, contrary to the court's statement, no such affidavit was made. The affidavit to which the court mistakenly referred in its opinion was filed on December 22, 1966, in connection with a number of petitioner's pretrial suppression motions, long before the disclosure of the wiretapping.[10] R. 3, 977-79. So far as the wiretapping is concerned, no government lawyer took an oath that it was

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[9] That such an affidavit, even granting its *bona fides*, is not worth the paper it is written on is demonstrated here by Yung's testimony that I.R.S. would have no way of knowing that information he supplied came from wiretapping. Still less could the Justice Department lawyers know the ultimate source of the information they drew from the I.R.S. files.

[10] Indeed, if, as they say, the Justice Department lawyers first learned of the wiretapping in January of 1967, they could not have been referring tc it even tacitly in their affidavit a month earlier.

not used, one way or another, against petitioner. Even wiretapper Yung limited his peculiar testimony "to the best of [his] recollection."

Nor is there any truth to the observation of the Court of Appeals that petitioner was permitted to re-subpoena Yung for a second voir dire. That observation was presumably based on statements to similar effect in the government's brief below (at pp. 46 and 47). The government's record reference (R. 72) shows that petitioner had requested that Yung not be excused from the government's subpoena until the defense could conduct some investigation prior to resuming cross-examination and the court ruled that "when he gets off the stand, he is excused unless he is resubpoenaed." That is a far cry from offering the defense a second voir dire. The record shows, indeed, that, after taking under advisement the holding of any voir dire beyond the testimony already taken from Yung, the court held the parties to a six-day-a-week trial schedule which, of course, precluded either investigation or further voir dire, and then, even before the defense began to put in its case, announced that it considered the Yung testimony to have concluded the taint issue.[11]

In approving the refusal to disclose the name of the Miami wiretap-monitor, the Court of Appeals abandoned reliance on the spurious "confidential informant" characterization, but relied instead on the fact that the employee's responsibilities were "predominantly custodial." That very feature of the employee's duties, however, made him a potentially important witness and, what is more, one less motivated to withhold the truth than Yung.

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[11] Statement, *supra*, pp. 8-9.

This Court, if its policy is indeed not to be stultified, should not tolerate a Court of Appeals conclusion that such an abortive hearing as was held in this case "fully discharged" judicial responsibility.

3. This Court has never directly ruled on the question whether documents illegally seized by the government and ordered returned under F.R.Crim.P. 41(e) may, after a new taking by lawful process, be used in evidence against the accused in a criminal case. In *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920), the Court held, in implementation of the exclusionary rule of *Weeks* v. *United States,* 232 U.S. 383 (1914), that the government may not take advantage of an illegal seizure to use the knowledge obtained thereby as a basis for a later legal production order. In so holding, it declared:

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." 251 U.S. at 392.

In the case at bar, the courts below resolved against petitioner his contention that the government had utilized knowledge gained from the illegal seizure as a partial basis for the administrative subpoenas later issued. That question, being one largely of fact, is not pressed here.[12] What is pressed here is the question left open in *Silverthorne*: may the government, having no independent source for *the facts* contained in

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[12] See, however, Judge Wyzanski's findings in *Lord* v. *Kelley,* 240 F. Supp. at 170 (App. B, *infra,* p. 41a), referred to *supra,* p. 10.

the suppressed documents, retake the documents by legal process and introduce *the documents themselves* in evidence in prosecuting the accused?

The Court of Appeals, in *McGarry's, Inc.* v. *Rose,* concluded that it was "consistent with the doctrine" of *Silverthorne* to answer this question affirmatively. 344 F.2d at 419 (App. B, *infra,* p. 35a). In so doing, we submit, the court misread *Silverthorne* to say that, despite the illegal seizure, the *documents,* as well as the facts evidenced by them, remain usable by the government. The only limitation thus placed on repossession and evidentiary use of documents suppressed because of illegal seizure is that the government have knowledge, independent of the seizure, of the existence of the documents. Under that view, suppression would be a meaningless ritual wherever, by hypothesis, the existence and nature of documents can be said to be known, *e.g.,* ordinary records of corporations, labor unions, etc., and, in general, records required to be kept under the myriad governmental regulatory schemes. In all such areas, the government would pay no price for commencing its investigation by burglary and then, only if challenged, substituting legal process. Nothing would be left of this Court's position in *Elkins* v. *United States,* 364 U.S. 206, 217 (1960), that the purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." The court below closes its eyes to reality when it says that government agents who have a basis for a lawful taking require no deterrence. The miscreant agent in the case at bar actually had a subpoena in his pocket when he made his unlawful seizure. The advantage of proceeding illegally, rather than using

the subpoena, was that he could take possession of the documents summarily, circumventing petitioner's opportunity to test the validity of the subpoena. See *Lord* v. *Kelley,* 223 F. Supp. at 687 (App. B, *infra,* pp. 44a-45a).

The Court of Appeals, to avoid a sanction against the government which it deemed "incommensurate" with the government's wrongdoing, imposed no sanction at all. We think this Court should grant the writ here sought to consider the direction in which the exclusionary rule must move in such a case—whether toward no sanction at all, or toward one which, although the court below finds it "incommensurate", is the only one effective and available.

4. The decision below raises a grave question as to the availability of the "cash hoard" defense, one of the defenses most frequently employed in net worth-expenditures tax prosecutions. This is a defense which the accused is entitled to make and the prosecution has the burden to negate. *Holland* v. *United States,* 348 U.S. 121, 128 (1954). Recognizing the difficulty of negating such a defense, this Court held that a jury could properly resolve the issue against the accused merely on a prosecution showing, like the showing made here, see App. B, *infra,* pp. 6a-7a, that, during the period of alleged possession of the hoard, the accused behaved in a manner that was arguably inconsistent with such possession. 348 U.S. at 133-34. In so holding, the Court implicitly held that the cash hoard issue, despite the cogency of the prosecution's showing of improbability, was not to be withheld from the jury. In the instant case, the jury was permitted to hear the defense evidence that, in the middle of the period covered by the computations from which the

prosecution produced a starting figure, the accused had received a $300,000 gift from his father. It was not permitted to hear, however, the testimony of an expert witness that the inclusion of the gift in the government's computations would so change the starting figure as to show that there had been no underpayment of taxes. Moreover, notwithstanding this Court's view of the virtually dispositive effect of summary charts upon the jury's determination, 348 U.S. at 127-28, this jury, while given the government's summary charts showing tax underpayment, was not permitted to see the defense chart showing, in view of the alleged gift, that there was no tax underpayment.

The trial court's rulings imposed on the accused, as a condition for reliance on the cash hoard defense, the burden of proving that the expenditures alleged to have been taxable income were actually made out of the hoard. The Court of Appeals relaxed that burden to some extent. It would require the accused to prove only that the hoard, which came into existence in 1950, remained substantially unexpended as of December 31, 1954, and was, therefore, on hand at the end of the period covered by the calculations from which the government derived its starting figure. The burden imposed on the accused would still be a massive one. The only way to sustain it would be to prove what his 1950-1954 expenditures were. But the Court of Appeals held that the expenditure figures contained in the 1950-1954 statements, which the government received from the accused and introduced in evidence, need not be considered as evidence of his expenditures in relation to the cash hoard defense. The only way, therefore, for the accused to sustain the burden thus imposed on him would be for him to undertake a kind

of counter-net worth analysis. Instead of the government proving that he had unreported taxable income, the accused would have to prove that he did not. This total reversal of burdens cannot have been contemplated in *Holland.*

Every judge and lawyer who has ever participated in a net worth-expenditures tax case knows that, until the last exhibit is introduced, the proof is a study in boredom. Multitudes of witnesses deluge the jury with dull details of ostensibly unrelated transactions of the accused. None of the testimony can have any meaning for the jury until the government's last witness takes the stand and describes the last exhibit, a graphic representation of all the transactions, with figures marching down a column to a conclusion of tax evasion. This Court, while recognizing the necessity of the net worth-expenditures form of proof, pointed out, as one of the dangers to be guarded against, that, when the jury takes the government's charts into the jury room, "the bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." 348 U.S. at 128. It would seem to follow that, under a procedure which excludes the defense charts and sends only the government's charts to the jury, the prospect that the verdict will reflect not the evidence, but only the last figure on the government's chart, rises from probability to virtual certainty. Such a procedure makes a shambles of the fine counterbalancing of necessities and safeguards in *Holland.*

Since, as noted in *Holland,* the net worth-expenditures method is the form of proof increasingly used in "run-of-the-mill cases", *id.* at 126, the need for this Court's review of the procedure here employed is apparent.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1, 1968

APPENDIX A

Statutes Involved

Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broad-

cast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. § 7201:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

F. R. Cr. P., Rule 41(e), 18 U.S.C.:

Motion for Return of Property and to Surpress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to surpress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6925.

BERNARD G. McGARRY,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,

MC ENTEE and COFFIN, *Circuit Judges*.

Edward Bennett Williams, with whom *Peter R. Taft* and *John Warren McGarry* were on brief, for appellant.

Edward F. Harrington, Assistant U. S. Attorney, with whom *Paul F. Markham*, United States Attorney, was on brief, for appellee.

December 27, 1967.

COFFIN, *Circuit Judge*. Appellant appeals from his conviction for income tax evasion, in violation of 26 U.S.C. § 7201, for the calendar years 1959, 1960, and 1961. Error is alleged in the district court's refusal to admit into evidence a net worth chart and supporting testimony prepared by appellant's expert witness; in the admission into evidence by certain statements allegedly made by appellant

to revenue agents; in the court's refusal to suppress certain evidence obtained through allegedly wrongful seizure; and in the court's refusal to hold hearings on motions to suppress and dismiss based on wiretapping and other alleged invasions of privacy.

Appellant's Net Worth Chart

The first question is whether, this being a case in which the government utilized the net worth method of proving unreported taxable income, the court erred in excluding a net worth statement submitted by an expert witness of appellant. The net worth method seeks to derive taxable income in any given year by determining from all available evidence of assets and liabilities the increase (or decrease) in taxpayer's net worth over a twelve month period, adding to it his non-deductible expenses for that year, and subtracting from that sum any amount attributable to non-taxable sources. For example, if a taxpayer begins the year with a net worth (cost of property less liabilities) of $40,000, ends it with $50,000, and has spent $7,500 during the year on living expenses, his receipts must have been at least $17,500. And if there is no likely non-taxable source of funds, such as gifts or inheritance, this set of facts constitutes strong circumstantial evidence that the receipts were taxable income.

The critical foundation for the computation is the starting net worth position. The government, to derive its point of beginning in 1959, the first taxable year, used net worth statements given by appellant some years before to revenue agents who were then investigating him. They covered the years ending December 31, 1945 through December 31, 1954. For part of this period appellant made a civil settlement for additional tax, fraud and other penalties, and interest. Appellant's net worth reported by him, as of December 31, 1954, was $36,377.75.

This the government took as its starting point making several adjustments, mostly in appellant's favor (such as

adding loans receivable), resulting in a beginning net worth figure of $55,346.07. The government then proceeded to analyze appellant's net worth each year thereafter through the tax years in issue, making detailed studies of his investment in or loans due from five or six corporations, together with his interest in other property, and liabilities. Drawing upon the testimonial and documentary evidence given at trial, an expert prepared and testified from a chart showing taxable income for each of the years in question considerably above that shown in the returns.[1]

The defense was based principally on appellant's contention that in 1950 he had received a cash gift from his father in the amount of $300,000. This cash hoard, he argued, not only accounted for increases in his assets but was available for and should have been credited to his non-deductible living expenses. Since both his increases in assets and his personal expenditures were explainable by a non-taxable source, there existed no basis for concluding that he failed to report any taxable income.

The existence of this alleged cash hoard was not only appellant's case on the merits below, but exclusion from evidence of a net worth chart assuming its existence, is a major basis for this appeal. We review, therefore, the evidence on this point.

The initial evidence of the alleged gift came from appellant's brother who testified that he witnessed the transfer of $300,000 by his father to appellant in the basement

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[1] The following figures from the government's net worth chart indicate the extent of appellant's alleged unreported income:

	1959	1960	1961
Taxable income	$63,342.44	$34,008.37	$54,933.82
Reported income	24,445.16	27,042.38	24,065.19
Unreported income	$38,897.28	$ 6,965.99	$30,868.63

of McGarry's Tavern one day in 1950. As to the subsequent history of the cash hoard, he further testified as follows:

> "Q. Now, whether or not, sir, as a result of that gift you know whether or not your brother spent any of it? A. Yes, he has.
>
> "Q. Right up to the present time? A. Through the years."

A government witness, Nasif, had testified that in September of 1952, during the course of the investigation for the years 1946-1951, appellant was asked if he had ever received any inheritances and answered that he may have although he was not certain at the time. It was after this conversation that appellant's accountant, who had been present at the interview, prepared the first series of net worth statements. The accountant testified that he knew of the $300,000 gift, that he told the investigators about it, but that he did not include it in the net worth statements because he considered the gift non-taxable.[2] Nasif denied being told of any gift and said that had such a gift been reported there would have been no additional tax assessed against appellant. A civil settlement was entered into for the years 1949-1951, in the amount of $5,204, covering additional tax and a 50 per cent fraud penalty.

The government, attempting to negate the existence of the cash hoard, introduced evidence that in 1940 appellant's father, the alleged source of the $300,000 gift, lost his home by foreclosure, the outstanding mortgage then being $1,600; that from 1943 to 1945 his annual wage as an employee of Bethelehem Steel Company was $3,000; that from 1946 to 1951 his sole reported source of income was his salary from his own establishment, McGarry's, Inc., the highest amount being $2,600 in 1947; that at the time of his death he was living in a Veterans Housing Project apartment leased to

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[2] According to Nasif's notes, however, appellant answered questions directed to receipt of gifts exceeding $100 or inheritances by indicating that such data would be included in the net worth statement which he agreed would be forthcoming.

a son, appellant's brother; and that on his death he left no estate and that no inheritance tax, gift tax, or estate tax return was filed on his behalf. Appellant himself had a mortgage on his own home from 1947 until he sold it in 1960 and obtained a mortgage on his summer home in 1953 which remained in effect until he sold it in 1963.

Committed to the cash hoard theory as the only explanation of his true wealth, appellant sought to introduce into evidence a net worth chart prepared by his own expert witness. This chart commenced with an "equity" or net worth figure for December 31, 1954 of $357,283.72, compared to the government's figure of $55,346.07. It showed a steady diminution of net worth to a figure in 1961 of $299,336.95, compared to the government's showing of increases to a 1961 figure of $244,490.17. The end result was a showing of no unreported income between 1955 and 1961, compared to the government's showing of unreported income in each year, aggregating $190,885.15. The critical difference between the appellant's exhibit and that of the government lay in the figures for cash on hand as of December 31, 1954 —$288,000 in appellant's exhibit and $6,000 in the government's exhibit.

While the government took its figure from appellant's own 1954 net worth statement to which we referred earlier, appellant's expert testified that he began his computations as of December 31, 1951 by adding the $300,000 cash gift to appellant's cash figure of $18,000, reported on his net worth statement for that date. He then worked forward from that starting point of $318,000 in 1951 and arrived at a cash figure of $288,000 at the end of 1954 by doing a net worth analysis on the basis of appellant's tax returns and net worth statements.[3]

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[3] The record is far from clear how appellant's expert proceeded. At one point he testified that his cash-on-hand figure in 1951 was $300,000; at another point the figure is $318,000. As to method, he testified: "I took the $300,000 that was in evidence, took the tax returns and the net worths that were introduced in evidence and made a calculation, and I also took into consideration [revenue

The district court excluded this chart. In a post-trial memorandum and order addressing appellant's motion for a new trial, the court cited as the most important reason for the rejection of the summary exhibit the fact that it was not based on the evidence.[4] This had been also the chief thrust of the argument of government counsel.[5]

Appellant charges that this ruling, excluding his expert's net worth chart and testimony, was error because the court applied standards to this chart which were more strict than

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agent] Roberson's schedule that he made of monies available from 1946 through 1954." While we try to follow the explanation of appellant's witness as to how he derived a 1952 cash-on-hand figure from his 1951 starting point, we are unable to follow his arithmetic. We assume, however, that his data and technique in bridging the gap from 1951 through 1954, and thereafter, were identical or similar to those the government used, except for the additive factor of the cash hoard.

[4] The memorandum, in salient part, is as follows:

> "This exhibit was excluded for several reasons, the most important being that the defense elicited not one iota of testimony concerning the manner in which this alleged sum of money was expended. Even assuming that a gift of $300,000 did take place, there was not a scrap of admissible testimony to show whether the money was retained unspent, or was expended in one year or two, or, as the exhibit purported to show, was expended over the period 1955-1961 in amounts precisely reflecting the Government's proof of expenditures in that period. This being so, the summary exhibit was not based on evidence in the case, but upon mere suppositions and conclusions. It was, therefore, not a summary of the evidence and was properly excluded.... It is enough that there was no evidence of the manner in which the alleged $300,000 was spent, so that the chart in no way could be thought of as a summary of evidence in the case."

[5] On voir dire, he urged, "The fatal error in this chart is this: Assuming that the defendant did have $300,000 in cold cash in 1951—assuming that he had that and his brother counted it, $300,000—there isn't a scintilla of evidence as to what happened to the money after that. There isn't a bit of evidence as to what happened to the $300,000 after that."

those applied to the government's chart or those required by law. He argues that his expert's cash figure of $288,000 as of the critical starting point, December 31, 1954 (and, for that matter, the cash figure for each sucessive year), was supported by the evidence. Starting with $318,000 of cash as of December 31, 1951 (the cash gift of 1950 plus the $18,000 reported in appellant's net worth statement for 1951), which was "spent through the years", appellant reasons that the evidence of outflow from this reservoir between 1951 and the starting point was supplied by the same expenditure data used by the government. He contends that the court misunderstood the law when it declared (see n. 4) that there had been no evidence showing to what extent, if at all, the cash hoard remained unspent in any particular year. Appellant urges that he is entitled to the benefit of what he calls "The single paramount rule . . . that cash-on-hand must be applied against expenditures unless there is affirmative evidence of some other disposition."

Our difficulty is not with this principle but with its application to the facts of this case. What is lacking here is the predicate for its invocation, i.e., proven cash on hand. To put it another way, appellant seeks to use a method for attributing expenditures to known available resources to prove the existence of those resources. To view his argument starkly, he asserts that, *as a matter of law,* the district court had to assume (1) that nothing was spent from the cash hoard in 1950, the year of receipt; (2) that nothing was spent in 1951; (3) that, from 1952 through 1954, nothing more nor nothing less was spent from the reserve than an amount equalling appellant's non-deductible expenses; (4) that, from 1955 through 1958, up to the prosecution period, nothing more nor less than the amount of such expenditures was spent; and (5) that sufficient cash remained during the prosecution years, 1959-1961, to cover all increases in net worth.

We cannot accept as a legal imperative the substitution of such a chain of assumptions for direct evidence of cash

on hand available during a given year. A close reading of all the authorities cited by appellant on this point confirms our view. In *United States* v. *Caserta,* 199 F.2d 905 (3d Cir. 1952), the court properly held that the government could not double count a taxpayer's known cash withdrawals from his bank and purchases made from cash in a given year without proof that the purchases had no connection with the withdrawals. In *Marcella* v. *Commissioner,* 222 F.2d 878 (8th Cir. 1955), the court reversed the Tax Court for failing to credit a $17,490.71 increase in bank loans, the proceeds of which were available to taxpayer, against his expenditures. The precision of the figure underscores the absence of speculation about the existence of "cash on hand" at the beginning of the tax period. In *United States* v. *Altruda,* 224 F.2d 935 (2d Cir. 1955), the government had failed to credit against expenditures certain realty income received in two tax years. Not only was the amount of this income during the tax years not in dispute, but the court, in assuming that it was spent, was influenced by the fact that defendant had reported a cash-on-hand figure at the end of the tax period of only $100. We confess our inability to read anything into such cases which requires the kind of leap appellant would have us take.

The remaining case cited by appellant on this point, *United States* v. *Costello,* 221 F.2d 668 (2d Cir. 1955), *aff'd,* 350 U.S. 359 (1956), is, to our mind, positive support for our view. Appellant seeks comfort from the action of the court in ruling that it was unreasonable for a jury to assume that the defendant had a smaller cash reserve at the beginning of the tax period than $40,000. But the court noted that defendant's "situation was far from ordinary", that defendant was a large-scale gambler and "had always kept such reserves in large amounts". 221 F.2d at 673. More pertinent to the issue now before us is the reasoning of the court in upholding the trial judge's refusal to admit in evidence on defendant's behalf earlier deficiency assessments against him. These were sought to be used to prove

that defendant had much more unreported income in pre-indictment years than appeared in the prosecution's computation and that therefore he began the indictment years with a cash reserve large enough to cover all purchases.

Judge Learned Hand, writing for the court, said:

> "Costello did not suggest that he meant to supplement the assessment by showing how much of the alleged unreported net income had been spent for consumable purchases, or how much remained, or might have remained, as a concealed cash reserve on January 1, 1946. He stood upon their admissibility as they read.
>
> * * *
>
> "If they were competent, they were relevant to show that Costello had received $90,000 of unreported net income more than the prosecution had succeeded in proving that he had received of unreported gross income during the eight years before January 1, 1946. That could, indeed, have been one link in a chain of reasoning to prove that he might have had a cash reserve in his hands on January 1, 1946; but it would be only a link, and it proved nothing, unless accompanied by evidence as to what had been done with the income so received. So far as Costello or his wife might have spent it for consumable goods, or have otherwise disposed of it, it could not be part of a cash reserve; and there was no presumption that they had not so spent it." 221 F.2d at 674.

Counsel in the case before us urged in argument that were appellant obliged to show how the cash reserve was spent, the Fifth Amendment would be violated. The Supreme Court has weighed this argument, saying in *Holland* v. *United States,* 348 U.S. 121, 138-39 (1954):

> "Once the Government has established its case, the defendant remains quiet at his peril. Cf. *Yee Hem* v. *United States,* 268 U.S. 178, 185. The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads."

Had the linkage between dates and amount been supplied, as in *Epstein* v. *United States,* 246 F.2d 563 (6th Cir.),

cert. denied, 355 U.S. 868 (1957); and *Kampmeyer* v. *United States,* 227 F.2d 313 (8th Cir. 1955), *cert. denied,* 351 U.S. 904 (1956), appellant's chart would have been entitled to admission. Without such evidentiary linkage, it may well be that such a chart is inadmissible as a matter of law. *See Oertle* v. *United States,* 370 F.2d 719, 727-28 (10th Cir. 1966), *cert. denied,* 6/5/67; *United States* v. *Moody,* 339 F.2d 161, 162 (6th Cir. 1964), *cert. denied,* 386 U.S. 1003 (1967); *United States* v. *Kiamie,* 258 F.2d 924, 932-33 (2d Cir.), *cert. denied,* 358 U.S. 909 (1958). But we need go no farther here than to say that the district court acted within permissible bounds of discretion.

Wholly apart from the soundness of the district court's ruling on admissibility of the net worth exhibit, we see no prejudice to appellant. Admittedly the rejection of appellant's exhibit gave the prosecution an opening for argument which it vigorously seized and its exhibit had no competition for the jury's attention in the jury room. Nevertheless it is perfectly clear from the evidence, the argument, and the charge that the key issue in the case was the existence of the cash hoard. Appellant's expert testified to the effect, in eliminating tax liability, of a much higher starting net worth figure in 1955.[6] Counsel's argument to the jury centered on the issue of the existence of the cash gift. A substantial part of the court's instructions was devoted to this issue. And counsel in his brief on appeal states, "In the case at bar, the appellant went to the jury

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[6] "Q. Now, insofar as the item listed here 'net worth' is concerned, following that throughout the years '55 to '61, Mr. Linnehan, what if any, what computations—would you explain the computations used in that instance? A. Well, he starts off at 12/31/55 net worth $52,327.36. He says less prior net worth $55,346.07. If that figure were $355,000, then everything '56, '57, '58, '59, '60 and '61 would fall. So the opening net worth figure of $55,346.07 is the starting point. If that was in error, everything else would be in error all the way through. Q. Now, sir, when you say, 'all the way through,' that would, on the figure you gave, eliminate any taxes due throughout the years? A. Yes, sir."

primarily on the accuracy of the opening net worth, contending that he had $300,000 which the government did not include."

The jury therefore had the issue of the cash gift before them to the extent that their finding against appellant necessarily determined its nonexistence. The excluded chart was not, and could not have been, affirmative evidence of the receipt of the gift. Its relevance, so far as it had any, was simply that it was a graphic means of illustrating how, if appellant had received and retained the gift for the appropriate period, his income would not have been understated. Since, however, the jury, as the case was ultimately presented to it, necessarily rejected the basis upon which the chart was prepared, we state, as an alternative holding herein, that any error in the exclusion of the chart could not have been prejudicial.

Admissions to Revenue Agents

A second error is alleged, in the admission into evidence of a 1958 memorandum of an internal revenue agent, Pastore, that appellant had told him that his 1957 income tax return included income of $4,000 from parimutuel winnings.[7] Pastore, no longer in government service, had no memory of the conversation which led to the memorandum. Nor was his memory refreshed by reading it. And while he at first stated that he did not know whether the contents were true and correct and conceded that he had sometimes signed papers without reading them, he subsequently, on four occasions during the trial, testified that the memorandum was true and correct as of the date of its making.

Appellant, citing 3 Wigmore, Evidence § 747 (3d ed. 1940), argues that the memorandum was inadmissible as

[7] Appellant feels this was prejudicial because it indicated a likely source of unreported income and might have led the jury to conclude that appellant's involvement with both gambling and bookmaking had not ceased on his father's death.

past recollection recorded for the reason that Pastore's testimony indicates he could not vouch for its accuracy from habit or course of business. We think the memorandum properly admitted. A document is not rendered incompetent solely because an attesting witness may acknowledge that he sometimes signs papers without reading them, where the record is replete with references to testimony by the same witness that a specific document was true and correct at the time of its making.[8]

Appellant also assigns as error the reception of testimony from another internal revenue agent, Nasif, that, in the course of a tax investigation in 1952, appellant stated that part of his income from 1946 to 1951 came from gambling and bookmaking. Appellant was said also to have stated that he operated alone, did not lay off any bets, and stopped these operations as of November 1, 1951. This testimony is attacked as introducing evidence of early offenses, independent of those charged, unnecessary to the proof of wilfulness in view of the admitted payment of a fraud penalty for the years 1949 through 1951, and uncorroborated by other evidence.

Admission of Nasif's statements was not prejudicial. Appellant's brother testified, as part of the case for the

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[8] We note, in addition, that the authority relied on by appellant warns against the rigid application of inflexible dogmas. "Courts should cease to treat [the "past recollection recorded" rule] as anything but provisional and [a] crude aid to truth. The trial Court's discretion should be allowed to control. There should be liberal interpretation and liberal exemption. And no ruling of admission should ever be deemed an error worth noticing on appeal." Wigmore at § 755. While we may not go so far as to adopt the quoted language above, we deem the court in this instance to have acted within its discretion.

The government also submits that the document in question was admissible as a federal business record. 28 U.S.C. §§ 1732-33; *Connolly* v. *United States*, 249 F.2d 576, 587-88 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958). Since we find it admissible as past recollection recorded, we do not reach the argument.

defense, that appellant had been associated with his father in gambling operations until the time of his father's death in December 1951 and that these operations constituted the principal source of his father's cash. This evidence of source was essential to appellant's case in order to explain how an elderly man, living in modest circumstances, on low wages, and having had financial difficulties, could accumulate such a large cash hoard. The evidence of appellant's association in gambling with his father may not have been helpful to appellant, but it was given by a defense witness and was not made tactically necessary by prosecution testimony. It is clear that appellant cannot successfully claim prejudice from the fact that both defense and prosecution daubed him with tar from the same brush.

What we have just said applies even if the admission of the Nasif testimony were error. But we do not think it error. Appellant's accountant had submitted a net worth statement showing appellant's cash on hand as of December 31, 1951 as $18,000. Appellant's compensation as an officer and employee of McGarry's, Incorporated was supplemented in his tax returns by an entry under the caption of commission salesman, which proved to represent gambling and bookmaking receipts. That appellant should have included in his explanation of his financial position such activities as subject to opprobrium as bookmaking is some evidence that there had been no large inheritance. If a legitimate source of wealth had existed, so a jury might justifiably reason, there would be little sense in basing the explanation on a less respectable source. Moreover, appellant's statement that he operated alone could have led the jury to find that his father was not in the gambling business, that he therefore did not accumulate a large cash reserve to give to his son, and that the gambling operation at McGarry's, not stemming from the father's operations, was continued as a likely source of income for appellant.

The very facts that in 1951 appellant hid this income under a misleading caption, that in 1952 he was warned of

his inadequate records, that in 1957 he was found to have reported gambling winnings under the rubric, "various sources—$4000", and that another such caption appeared in 1958 tend to show a pattern of looseness in reporting and record-keeping congenial to those engaged in gambling pursuits. We cannot say that the earlier as well as the later evidence is irrelevant on the issue of wilfulness. *See Holland* v. *United States, supra,* 348 U.S. at 139.

Appellant seeks to equate the facts here with those in *Massei* v. *United States,* 241 F.2d 895 (1st Cir. 1957), *aff'd,* 355 U.S. 595 (1958), in which we held that it was error to receive testimony of an admission of graft long antedating the indictment years where the admission was uncorroborated, and there was no evidence of continuity of or even opportunity to engage in such activity. Here the admissions, as we have noted, were corroborated by defense testimony, were relevant to the issue of credibility of the cash hoard theory, and were tied in with a pattern of misleading reporting and continuity of involvement in gambling, a possible source of unreported income. Finally, we note that both at the time of the Nasif testimony and during the charge, the judge gave the jury appropriate instructions.

Motions to Suppress

The prosecution introduced many business records concerning enterprises with which appellant was associated. These documents, necessary to the government's net worth analysis, were subjected to repeated motions to suppress. Error is charged in the court's denial of these motions. The litigation history of these particular records is already almost uniquely protracted.

In *Lord* v. *Kelley,* 223 F. Supp. 684 (D. Mass. 1963), the district court held that although an administrative subpoena had been prepared for service on appellant's accountant, one Donald Lord, a turn-over of records of appellant and his companies was accomplished without resort to

the subpoena, by measures found to be coercive, so that the records were wrongfully seized. The records were ordered returned but not permanently embargoed, the court noting that the agent who prepared the subpoena had previously known of the records. We dismissed an appeal from that part of the order which refused a permanent injunction in future criminal proceedings on the ground that the government had not yet sought production of the records. *Lord* v. *Kelley,* 334 F.2d 742 (1st Cir. 1964), *cert. denied,* 379 U.S. 961 (1965). The government soon issued summonses for many of the same records, the district court ordered them enforced, and we affirmed the judgment in *McGarry's, Inc.* v. *Rose,* 344 F.2d 416 (1st Cir. 1965), holding that the government could reacquire the records by legal process for use in a future criminal proceeding.

While we might simply say that the issue of the production through legal process of these records has been foreclosed, we note that the initial order of the district court in *Lord* v. *Kelley, supra,* proscribed use of otherwise unknown information gleaned only from the illicit custody of the seized records. Appellant has claimed that subsequent summonses were fatally infected by scrutiny of the illegally seized records. We have reviewed all of the evidence on this issue and must reject the claim.

To begin with, as appellant's witness, a former revenue agent, testified, the first subpoena had listed all possible categories of business records. To know that records relevant to the status of a business include ledgers, journals, cancelled checks, bank statements, vouchers, corporate minute books, cash receipts and disbursement records, deposit slips, ending inventory reports, and corporate correspondence is hardly today an occult art. An apprentice investigator would ask for such records. This is no more than the government did in this case.

It operated, however, from a great deal more information than an apprentice would have. Long before the illegal

seizure, government agents had studied a large volume of records, had had the advantage of interviews with appellant's accountant and many man hours of analytical work. So far as we can tell from the record, all that the illegal seizure contributed was a basis for comparing what had been received with what had been requested in order to avoid duplication when a later summons was issued for additional records. Close analysis reveals that so-called "clues", mentioned by appellant's witness, led only to such boilerplate items as check book stubs, bank statements, and inventory records. It is clear to us that this is not a case where an illegal search has revealed unsuspected data which is sought to be blanketed under a later "legal" subpoena. *Cf. Agnello* v. *United States,* 269 U.S. 20 (1925).

Appellant argues that the ruling in *McGarry's, Inc.* v. *Rose, supra,* will permit wholesale violations of the Fourth amendment. We do not share this apprehension. We suspect that the government would ordinarily seek to avoid both the inconvenience of delay when records are required to be returned and the risk of a judicial finding that valuable leads were obtained while records were in wrongful custody. To impose the greater sanction of permanent immunization whenever a seizure of ordinary business and corporate records has been invalidated would place an incommensurate burden on the government, unnecessary for the protection of commercial privacy. Indeed, such a sanction could lead taxpayers to play a game, inviting seizure on the chance that it could arguably be converted into an effective vaccination against any future use of such routine records.

Motions for Hearings

Appellant urges two points related to invasion of privacy in the nature of wiretapping. The first challenges the adequacy of hearing on an admitted wiretap and the second challenges the failure of the district court to hold a voir dire hearing on the issue whether a "pen register" device

had been attached to appellant's telephone to record numbers called.

On the first day of trial the prosecution disclosed that a wiretap had been placed on the telephone of a Miami, Florida resident from August 1962 through August 1963 and that in July or August of 1963 two incoming calls of appellant were recorded, in which appellant expressed interest in gambling operations, i.e., laying off bets. The court then held a voir dire in which the agent in charge of the tap, Yung, testified that a government employee or "informant" in Miami had the responsibility of changing the tapes and sending them to Washington, that no record of the conversation was kept, and that the tapes were erased after Yung had listened to them. Yung transmitted no information regarding these calls during the investigation of appellant and had occasion to recall the conversations only two months before trial when he was given a long list of names (including that of appellant) by the General Counsel of the Internal Revenue Service.

The government filed an affidavit that no evidence illegally obtained or "tainted" or any leads therefrom had been submitted to the Grand Jury or would be used in trial. There was no evidence as to gambling other than that stemming from appellant or his witnesses (which we have above discussed). There was no evidence involving individuals in Miami. Appellant, indeed, does not assert any basis for concluding that the wiretap resulted, directly or indirectly, in any evidence adduced at trial.

Appellant was given the opportunity to re-subpoena Yung to the stand for a second voir dire but did not do so. His chief ground for asserting error is that he was not allowed time, before trial resumed, to produce other witnesses and particularly to examine the government employee who had custody of the tapes at the site of the wiretap. While it would have been better practice for the

government to have made its confession of wiretapping well in advance of trial, we cannot say that the court gave an inadequate opportunity to appellant to explore the implications of the tap. The remoteness in time of the two conversations, the remoteness of the subject matter from that of willful tax evasion, the lack of any apparent connection — even after vigorous cross-examination — between the tapes and any evidence of event, place, or person presented at trial, and the predominantly custodial responsibilities of the employee at the tap site are adequate grounds for the court's exercise of its discretion. It fully discharged its responsibility to "give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." *Nardone* v. *United States,* 308 U.S. 338, 341 (1939).

As to the claim that it was error for the court not to have held a voir dire hearing on the possible use of a pen register, the appellant first filed a motion alleging the use of such a device and seeking the suppression of any resulting leads or information. It was signed by counsel, but contained no oath or averment as to the truth of the allegation. It and eleven other motions for suppression were denied for lack of "solidity", being unsworn. Subsequently, appellant filed a similar motion alleging use of a pen register, enclosing a memorandum requesting identification of the subscribers to some 58 telephone numbers, and also seeking the unpublished numbers for appellant and McGarry's, Incorproated.[9] The memorandum closed with a notation that the information was "for" a special agent of the Internal Revenue Service. The motion was signed by appellant and his attorneys as "true to the best of my knowledge and belief".

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[9] We note that, had the list been the result of the use of a pen register, there would be no explanation why unlisted numbers for named subscribers would be requested, i.e., a pen register converts pulses only to numbers, not names.

There was no indication that the list of numbers affixed to the supplementary motion had been obtained by a pen register. The motion was no more "solid" than that in *United States* v. *Flynn,* 103 F. Supp. 925, 930 (S.D. N.Y. 1951), *aff'd,* 216 F.2d 354 (2d Cir. 1954), *cert. denied,* 348 U.S. 909 (1955). Moreover, the government had filed an unreserved denial, on affidavits, of use of any illegally obtained evidence. *See United States* v. *Casanova,* 213 F. Supp. 654, 657 (S.D. N.Y. 1963). The district court was warranted in refusing hearing on the use of such a device. We note, finally, that appellant, prevented at trial from pursuing inquiry before the jury as to use of a pen register, did not request to examine telephone company and internal revenue officials on a voir dire.

Other motions to suppress were filed on the basis of testimony given by a former revenue officer before a Senate Subcommittee that he and others had observed appellant's premises with spy-glasses and had even broken into appellant's home. The extracts of such testimony annexed to the motions reveal that the former agent observed a jacket bearing the label "Leighton's Clothing Store". The prosecution, however, introduced no expenditure evidence relating to this item or this store, doubting the reliability of the agent who had been suspended and indicted at the time of his Senate testimony, and was convicted before the trial of this case. Again, appellant failed to make a showing that any tainted evidence had been used.

This was a vigorously contested twenty-one day trial, preceded and accompanied by many oral and written motions. We think that the rights of appellant were zealously urged and fairly protected.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6925.

BERNARD G. McGARRY,
APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

ON PETITION FOR REHEARING

Edward Bennett Williams, with whom *Peter R. Taft* and *John Warren McGarry* were on brief, for appellant.

Edward F. Harrington, Assistant U. S. Attorney, with whom *Paul F. Markham,* United States Attorney, was on brief, for appellee.

February 2, 1968.

COFFIN, *Circuit Judge.* In seeking rehearing appellant again complains of the exclusion of his proffered "net worth chart" and certain expert testimony. We think he confuses the stringent burden of proof imposed on the government in a net worth prosecution with the proper foundation which must be laid to render evidence admissible in any case. Appellant has not met the latter require-

ment, as we explained in our opinion. Without repeating all of the grounds for that conclusion, we note especially that he would have us hold that certain net worth statements provided by him to the government for the years 1950-54, which do not reflect the existence of the cash hoard allegedly received by gift in 1950, do in fact reflect all expenditures made from that hoard. We recognize that appellant was free to prove that his cash on hand for these years was in the neighborhood of $300,000, rather than between $5,000 and $18,000 as he had reported. But we cannot hold that, as a matter of law, the court was forced to accept the uniform expenditure figures in his statements of $6,000 a year as evidence of the extent to which the cash hoard had or had not been dissipated during those years.

As an alternate ground of decision, we held that even if the district court had erred in excluding the proffered evidence, appellant was not prejudiced in presenting his defense that the gift had been made and that the government's opening net worth figure was therefore erroneous. We can but reiterate that it is clear from the record that the key issue in the case was the existence of the alleged gift and consequent cash hoard. Expert testimony as to the impact of the alleged hoard on the government's net worth chart was, in fact, admitted in evidence even without any evidence that the hoard was in existence at the beginning of the period covered by the chart. The issue of the existence of the hoard and its impact was argued at length to the jury. The court gave complete instructions on the government's burden of proof, on the government's obligation to run down "leads" such as that offered by appellant and discrediting them, and of the impact of evidence casting doubt upon the opening "net worth" figure in the government's case. Under the circumstances we cannot see how petitioner can, except by failing to consider pertinent portions of the record, claim prejudice.

Petition denied.

DONALD R. LORD ET AL, PLAINTIFFS, APPELLANTS,

v.

ALVIN M. KELLEY ET AL., DEFENDANTS, APPELLEES.

No. 6307.

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT.

July 13, 1964

John Warren McGarry, Boston, Mass., for appellants.

John M. Brant, Atty., Dept. of Justice, with whom *Louis F. Oberdorfer,* Asst. Atty. Gen.,*Lee A. Jackson* and *Joseph M. Howard,* Attys. Dept. of Justice, *W. Arthur Garrity, Jr.,* U. S. Atty., and *Murray H. Falk,* Asst. U. S. Atty., were on brief, for appellees.

Before WOODBURY, *Chief Judge,* and HARTIGAN, and ALDRICH, *Circuit Judges.*

ALDRICH, *Circuit Judge.*

[1, 2] On April 18, 1962 Intelligence Agents of the Internal Revenue Service, upon what was stated to be an appointment for a routine audit, entered the combined place of business and home of appellant Lord, a public accountant, and departed some hours later with three cartons of business records, bank statements, checks and stubs, etc., belonging to the other appellants, hereinafter taxpayers, which had been in Lord's custody. Even disregarding dramatic embellishments suggested by Lord in his testimony, and by counsel in argument,[1] the agents' conduct was

[1] For example, although no force or threat of force was used in connection with the removal, counsel voiced as a special complaint that Lord's constitutional rights had been invaded in the presence of his 2- and 4-year old children.

taken either over the continued objection of Lord, or with consent obtained only by threats of personal harassment, and was in total violation, also, of the rights of the taxpayers. It is true that Flattery, the agent in charge, had in his possession a summons issued under authority of section 7602 of the 1954 Code addressed to Lord and requiring him to appear and give testimony on April 30 and to bring with him the books, records, ledgers, bank statements, cancelled checks and other papers, designated in general terms, of the tax payers here involved. The summons was served upon Lord as the agents were leaving. This summons, of course, was not a search warrant, nor did it even purport to justify anything done by the agents on April 18. The agents' conduct, in other words, was without semblance of excuse, and the finding of the district court that they knew there was none has not been, and could not be, assailed.[2]

Thereafter Lord, joined by the taxpayers, filed in the district court what they termed a "Complaint for temporary restraining order and injunction. Return of records and suppression of evidence." Named as defendants were the local District Director and the local Chief of Intelligence of the IRS, and the three agents who made the seizure. The relief asked was that all documents seized "and the oral information, statements and admissions made, and all leads and clues therefrom * * * be suppressed" and that the records, etc. be returned. Secondly, that defendants "be perpetually enjoined from using in any shape, form or manner whatever, directly or indirectly, and from * * * transferring to any person * * * any and all of such evidence illegally obtained." There were also prayers for a preliminary injunction and for general relief.

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[2] The only explanation offered was that the agents intended, if there was not a "voluntary" production, to summon these records, and wished to make a preliminary verification to make sure of full compliance. Expression of our views about such behavior seems hardly necessary.

Following a hearing at which evidence was introduced the court concluded that "where a federal criminal prosecution is probable a federal trial court shall have nonstatutory jurisdiction to enjoin federal enforcement officers from holding or using property they unlawfully seized." It made detailed findings and entered a judgment ordering all records, etc. taken from Lord returned to him, and enjoining all representatives of the IRS "and all persons who have acted in concert with them in the use of the records and papers transferred by Lord" from ever "using in any proceeding * * * any information or clues derived during the time they held such records." It further ordered that all "documents, writings, and other papers obtained from persons not parties to this action, * * * notes of interviews with and statements, affidavits and transcripts of testimony * * * and * * * work papers and other papers prepared by personnel of the Internal Revenue Service for use solely within the Government" be deposited with the Clerk of the District Court "open to inspection at any time, without restriction" by any judge or by Lord or by the taxpayers involved. The judgment continued, "[N]othing in this injunction shall preclude the United States or its agents from requiring by appropriate warrant, subpoena, summons, or other due process of law, the production of any record or paper covered by the summons" in the possession of the agents when they arrived at Lord's home. It is, essentially, from this last that appellants jointly appeal.[3] There is no cross appeal.

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[3] The notice of appeal was "*from that part* of the judgment * * * which denied that the unlawful search and seizure constituted a violation of the rights of said parties plaintiff under the 5th amendment to the Constitution of the United States as well as under the 4th amendment thereto; and further, which refused and denied to the said plaintiffs herein such relief sought as would perpetually enjoin said defendants herein from using the evidence illegally obtained from the books, statements, and leads and clues therefrom in any future proceedings, criminal, civil or administrative, Federal or State." Whether the search violated the Fifth Amendment as well as the Fourth does not affect our disposition of this appeal.

The first question is that of our jurisdiction. Before coming directly to this a further recitation may be in order. It is apparent that appellants have received all of the present relief requested. (Indeed, by a painstakingly thorough order they have received more present relief than they requested.) What they wish is that there be attached to the documents returned to them a perpetual immunity from process, civil, as well as criminal. Ostensibly, and persistently, they ask this relief in the name of restoration to the status quo, but, in fact, they ask it as a penalty.[4] The announced basis of the court's decision was that appellants were "entitled to be as well off as if Flattery had not unlawfully seized those papers, but * * * not * * * any better off".[5] It pointed out that "Flattery knew of these records before they were delivered to him. More significantly, he had already signed a summons covering those records." From this the court concluded that a total immunization of the records would not merely restore the status quo, but would deprive the government of the benefit of the knowledge it had before the incident. Appellants' response is that the record "clearly demonstrates" that the government had "no such prior independent knowledge." The justification, if any, for this statement must depend upon what is meant by the word "such." Obviously, and admittedly, the government did not have the detailed knowledge of specific

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[4] It was as a penalty that the district court did issue such an injunction in the recent case of Hincheliff v. Clarke, D.C.N.D. Ohio, 1964, 230 F.Supp. 91. The court's stated reasons were that the wrongful seizure had put taxpayers to great expense; that the fact that the taxpayers wanted the documents back might of itself cause the government to believe that they were not innocent; that to rule otherwise would give the taxpayers but a "hollow victory;" and, finally, that the U. S. Attorney there, unlike his Department of Justice counterparts in the case at bar, showed "no contrition."

[5] The court went on to say that the "penalty" should not go beyond preventing the government from gaining any advantage from its "dirty hands."

records beforehand that it had afterwards. But, equally obviously, it had very considerable knowledge, as the summons conclusively establishes.

In this posture we turn to appellants' principal, and insistent, position that there is an "express provision in the judgment below that these records and other property may now be obtained by process." The court, as already quoted, supra, clearly made no such provision. It merely stated that it was declining to rule the reverse. When the government's brief noted the difference appellants stated in reply, "This is at best a sophistry."

We might say, parenthetically, that we have some difficulty in deciding whether appellants are clear in their own minds what they are arguing. A considerable portion of their brief is devoted to the proposition that there are constitutional objections quite apart from, and independent of, the occurrences of April 18 which would prevent their records from ever being reached, and to making contentions which, *inter alia,* might be said to disregard the fact that some of them are corporate rather than natural persons. They seem to argue that the judgment below affirmatively overruled these objections. Of course it did nothing of the sort, and such questions could not be before us. The most that is before us is whether, if some other proceeding hereafter occurs, the events of April 18 must, as a matter of law, prevent every department of the government and every agency, administrative, civil or criminal, from seeing these records irrespective of what rights to do so the government would otherwise have had. When the government makes the point, on the issue of appealability, that no such proceedings have been instituted, and, conceivably, never may be, appellants reply that the government is advancing "the incredible proposition that * * * unless [government] agents * * * choose to initiate proceedings to compel production of those very records, appellants should not have appellate relief from the lower Court's denial of their con-

stitutional rights." However, it must clearly be that if there are no further proceedings no constitutional rights will have been denied.

This, it seems to us, indicates the answer to the question of appealability. We are not concerned with whether, had appellants' prayer for the return of their papers been denied, such refusal would have been appealable. Cf. Perlman v. United States, 1918, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950; explained in Cobbledick v. United States, 1940, 309 U.S. 323, 328-9, 60 S.Ct. 540, 84 L.Ed. 783; Reisman v. Caplin, 1964, 375 U.S. 440, 449, 84 S.Ct. 508, 11 L.Ed.2d 459. With the only question before us whether it is to be ruled now that if some future proceeding is brought the government's rights will be affected by what took place hitherto, and with no assertion of what these proceedings will be, appellants are, at best, seeking declaratory relief before there is a controversy.

[3, 4] If we should construe the district court's judgment as an affirmative declaratory ruling against appellants in any and all possible proceedings, as distinguished from a mere refusal to rule the way they requested, we are clear that it should be regarded as an interlocutory order only. This would mean that it is subject to revision by the particular judge who entered it, or by any other, in the light of the circumstances as they may eventually develop. Cf. The Haverhill Gazette Co. v. Union Leader Corp., 1 Cir., 1964, 333 F.2d 798; United States v. One 1946 Plymouth Sedan Automobile, 7 Cir., 1948, 167 F.2d 3, 8-9; see Ideal Toy Corp. v. Sayco Doll Corp., 2 Cir., 1962, 302 F.2d 623, 625. We would regard this as appropriate, but make, we may add, no suggestion as to how the court's present order should be interpreted, or whether or not it may have been sound.

[5] Appellants say that Di Bella v. United States, 1962, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614, indicates a con-

trary result. Di Bella held against appealability in a perhaps partially comparable situation. Appellants' argument is, in effect, that because none of the reasons given by the court there in support of its decision are here applicable, we should apply a reverse English. Without passing upon the correctness of appellants' premise, it is enough to say that it does not lead to the suggested conclusion.

Judgment will be entered dismissing the appeal for want of jurisdiction.

McGARRY'S, INC., et al., Respondents, Appellants,

v.

Frank E. ROSE, Special Agent, Internal Revenue Service, Petitioner, Appellee.

No. 6420.

United States Court of Appeals
First Circuit.

May 3, 1965.

Louis Bender, New York City, with whom John Warren McGarry, Boston, Mass., and Lloyd A. Hale, New York City, where on brief, for appellants.

Joseph M. Howard, Atty., Dept. of Justice, with whom Louis F. Oberdorfer, Asst. Atty. Gen., Lee A. Jackson and John M. Brant, Attys., Dept. of Justice, W. Arthur Garrity, Jr., U.S. Atty., and Murray H. Falk, Asst. U.S. Atty., were on brief, for appellee.

Before WOODBURY, Chief Judge, ALDRICH, Circuit Judge, and CAFFREY, District Judge.

CAFFREY, District Judge.

This matter (under a changed name) is before this court for a second time upon consolidated appeals from an order

entered by the district court on September 18, 1964 directing the enforcement of five administrative summonses caused to be served by appellee, pursuant to 26 U.S.C. § 7602, on March 19, 1964. The summonses required compliance therewith approximately ten days later. The district court ordered production pursuant to the Internal Revenue Service summonses of some of the same books, records, and papers which it previously found had been illegally seized and which it later ordered to be returned to appellants.

The factual background of this matter is set out in the opinion of the district court reported under the name of Lord v. Kelley, 223 F.Supp. 684 (D.Mass.1963), and in the opinion of this court reported at 334 F.2d 742 (1964), cert. denied 379 U.S. 961, 85 S.Ct. 650, 13 L.Ed.2d 556 (1965). The earlier opinion of this court dismissed the appeal in Lord v. Kelley because of lack of appellate jurisdiction.

The summonses involved in the instant appeal require the production of corporate books, records, and papers of McGarry's, Inc., J. E. Poor Co., Inc., M. J. Toomey Corp., and Ye Olde Brown Jug, Inc., and also work papers, correspondence, and memoranda of Alfred H. Lord and Donald R. Lord, accountants, relative to preparation of state and federal income tax returns, investments, and financial transactions of S. Leo and Louise C. Swartz for the years 1952 through 1961.

The five summonses involved herein indicate that the books and documents sought to be obtained thereby are substantially the same books and documents as those described in the summonses involved in the case of Lord v. Kelley. Appellee Rose filed the instant enforcement petitions in the district court on July 15, 1964, upon appellants' failure to produce or turn over the material described in the summonses, and a show cause order returnable September 14, 1964 was entered by the district court. A hearing on that show cause order was held September 18, 1964, about two months after the filing of the petition. At the conclu-

sion of the hearing the district court directed the appellants to comply with all five summonses. The order requiring compliance with the summonses was stayed by this court pending appeal on October 19, 1964.

The following contentions were raised in and disposed of by the district court adversely to appellants:

(1) that the summonses were invalid in that they required the production of the same books and records which were the subject of an unlawful search and seizure on April 18, 1962;

(2) that the required production might tend to incriminate the appellants in violation of the Fifth Amendment;

(3) that the required production was in support of an investigation of tax liabilities barred by the 3-year statute of limitations (i.e., barred except in the case of false or fraudulent tax returns);

(4) that enforcement of the summonses would violate the Fourth Amendment because the summonses are unduly broad, vague and lacking in speciality;

(5) that the summonses were invalid in that they failed to show that the respective papers, books, and records related to transactions with the taxpayers, Bernard G. McGarry and Marie G. McGarry.

[1] Reisman v. Caplin, 375 U.S. 440, 449, 84 S.Ct. 508, 11 L.Ed.2d 459 (1963) squarely holds that an order of the type entered by the district court is appealable, as was held in O'Connor v. O'Connell, 253 F.2d 365 (1. Cir. 1958).

[2, 3] The recent decision of the Supreme Court in United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed. 2d 112 (1964) is dispositive of appellants' contention that portions of the summonses were barred by the ordinary three-year statute of limitations. Likewise, appellants' contentions that

the initiation of the enforcement proceedings was invalid, and that the petitions filed in the enforcement proceedings failed to state a claim upon which relief could be granted find no support in the record nor comfort in Reisman v. Caplin, supra, or United States v. Powell, supra, where the Court said (at p. 52, 85 S.Ct. at p. 252) "we think it would be holding too strictly to the forms of pleading to require the suit to be recommenced, and therefore treat the enforcement proceeding as having been brought under §§ 7402(b) and 7604(a)."

[4] The record in the instant case shows that appellants were served with orders to show cause and petitions to enforce summonses, each of which fully apprized them of the nature of the relief sought by appellee. In the two-month interval between the issuing of the show cause order and the actual hearing thereon, appellants and their counsel had ample time to evaluate and study the petitions and show cause orders, and to file both short and lengthy motions to dismiss, as well as an answer, all of which put in issue before the district court the contrary positions of the parties on this matter. A reading of the opinion in United States v. Powell, supra, leaves no doubt that the thrust thereof is to insure that a taxpayer obtain an adversary-type hearing in the district court prior to his being forced to comply with an administrative summons which he challenges in good faith. That the procedure followed in the instant case fully complies with the essential requirements of the Powell decision appears so clearly from the record herein as to preclude any need for further discussion of appellants' contentions with reference thereto.

[5] The remaining and principal issue before us on this appeal is whether the Internal Revenue Service is barred now and forever from regaining possession of books, records, and documents by use of proper administrative summonses by reason of the fact that in April of 1962 certain agents of the Internal Revenue obtained possession of some

of the same books, records, and documents by conduct which the district court found was an illegal search and seizure, and which were ordered returned to appellants for that reason. Appellants urge upon us that the district court erred both in omitting from its order a provision perpetually precluding the Service from access to these books, records, and documents, and in providing in its order that the government was not barred from taking proper legal steps to obtain such of the books, records, and documents as were known to the government to exist prior to and independently of any knowledge gained from the illegal search and seizure. Appellants say that enforcement of the summonses under these circumstances is violative of their rights under the Fourth and Fifth Amendments.

The precise portion of the district court's order in Lord v. Kelley which is the basis of appellants' contentions appears at 223 F.Supp.684, at 691:

> "Provided that nothing in this injunction shall preclude the United States or its agents from requiring by appropriate warrant, subpoena, summons, or other due process of law, the production of any record or paper covered by the summonses which Flattery signed on April 18, 1962 before he arrived at Lord's home, or shall preclude the United States or its agents from using the contents of or clues furnished by a production later than November 19, 1963."

It is clear from the record appendix in Lord v. Kelley, (which on motion of appellants this court ordered incorporated by reference herein), that the district court based the above-quoted language on a specific finding: "Flattery knew of these records before they were delivered to him. More significantly, he had already signed a summons covering those records." (223 F.Supp. 684, 690). The record likewise establishes that the district court order in Lord v. Kelley did not preclude the Internal Revenue Service from taking the action which forms the basis of this appeal, i.e., issuing proper subpoenas for the production of records which the district court found were known to the Service

to exist independently of any knowledge acquired by the conduct ruled violative of the Fourth Amendment.

That the order of the district court in so doing was proper appears from a line of cases starting with Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), where the Supreme Court made it clear that the illegal seizure of property by government agents did not forever immunize the information contained therein from use in later legal proceedings or relegate them to a limbo in which they would be forever secret, inaccessible, and non-usable for any purpose thereafter. The Court explicitly pointed this out in Silverthorne Lumber, saying (p. 392, 40 S.Ct. p. 183): "Of course this does not mean that the facts thus (illegally) obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others."

The principle of the Silverthorne case has been reaffirmed by the Supreme Court in Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939), and in Wong Sun v. United States, 371 U.S. 471, 487, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962). The principle has been applied by the Second Circuit in Wagman v. Arnold, 257 F.2d 272, 276 (1958), a case in which, like the instant case, it was found that the government agents had knowledge of the existence of corporate records independent of the illegal search and seizure; and in United States v. Sheba Bracelets, 248 F.2d 134, 141 (2d Cir. 1957), cert. denied 355 U.S. 904, 78 S.Ct. 330, 2 L.Ed.2d 259, where, likewise, the court allowed the use of evidence found to have reached government agents from a legal and independent source despite the fact that that same evidence had been illegally obtained five years earlier by government agents.

The order of the district court herein is not violative of any asserted rights of appellants. It is consistent with the doctrine of the Silverthorne Lumber, Nardone, and Wong Sun cases. To strike down the district court's order on the facts of this case would be a perversion of the Fourth

Amendment conferring upon appellants a windfall benefit far beyond anything required by the Fourth or Fifth Amendments. Cf. Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1953).

Judgment will be entered affirming the judgment of the District Court.

DONALD R. LORD ET AL.

v.

ALVIN M. KELLEY ET AL.

Civ. A. No. 63-932.

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS.

April 13, 1965.

Lawrence F. O'Donnell and John Warren McGarry, Boston, Mass., for plaintiffs.

Murray Falk, Asst. U.S. Atty., W. Arthur Garrity, Jr., U.S. Atty., for defendants.

WYZANSKI, District Judge.

I.

This is a case that presents in microcosm the fascination, challenge, and risk of arbitrariness of proceedings in a District Court.

There are two ways to approach the petition here filed for attachment for civil contempt and punishment for criminal contempt. One way—perhaps the usual and certainly the more cautious way,—is, in the phraseology of the street, "to play the matter cool": that is, recite with simplicity the facts; briefly state the applicable principles of law; and purge all statements of any kind of color or life. The other way to approach this case is to make visible what is known to every sophisticated observer of this litigation and to use such skill as the judge possesses to put in rounded

fashion and with perceptive understanding the basic nature of the controversy.

There are no doubt particular dangers in the second approach. Throughout American history it has been apparent that there are undesirable consequences when a judge whose decree is alleged to have been violated sits in judgment on a claim that someone contemptuously violated that decree. Moreover, it has frequently been pointed out that even if the Constitution of the United States does not guarantee a jury trial in a case involving the alleged criminal contempt of a judge's equitable order, it is contrary to the radiations of the Constitution for a judge to sit without a jury in a criminal matter.

Yet, surprisingly enough, although the present case has been made explicitly a criminal as well as a civil proceeding for contempt, neither counsel has asked either that I should disqualify myself or that I or some other judge should sit with a jury. Perhaps it would not be too unflattering to say that I think that this omission was not intended as a compliment to me but was due to the characteristic method in which this case was inadequately prepared on both sides.

[1] Despite Lord Coke, law is not primarily artificial reason; it is a combination of precedent, pressure, and principle. The judge who has to find the facts and state his conclusions is caught in a swirl of forces, some of which go back to ancient times, more of which reflect current struggles for power, and not a few of which are connected with ultimate interests. To settle disputes in such a vortex one ought, if possible, to be completely detached. Indeed, a non-involved position is always a desideratum. Can this be accomplished when the very nature of the case suggests that the court has been affronted? By the definition of the offense of contempt the judge is himself immersed in the controversy as one of the factors of principal importance.

Recognizing this dilemma, I might disqualify myself, although no one has asked me to do so. No one could know

better than I that in all aspects of life—not only in court—while reason purports to hold sway, passion is antecedent to reason and, indeed, the very condition of its effective exercise.

Though a pallid timidity suggests that a self-regarding prudence might lead me to disqualify myself, in this particular instance it seems even more important to show that one is capable of what Spinoza said was the root of moral growth: the capacity to invoke one emotion to drive out another emotion. I hope that these findings and conclusions will prove that a passion for justice may prevail over a passion for indignation. At any rate, no kind of controversy more fully reveals the character and capacity of a court than its consideration of controversies concerning contempt.

II.

To understand this contempt case we must begin by facing up to the fact that the Government is in pursuit of a taxpayer, McGarry, who is certainly not the ordinary type of law-abiding businessman. It would be most undesirable for me to describe dramatically an individual who may ultimately be faced with a criminal prosecution in which he is entitled to the benefit of the presumption of innocence. Yet it would be naive not to recognize that in the evidence already taken [in this and cognate proceedings, it appears] that McGarry engaged in dubious activities, has a manner which suggests a conspiratorial purpose, and lacks the usual earmarks of civic excellence.

Believing, on what basis, of course, I need not state, that McGarry is a wilful evader of federal income taxes, the Internal Revenue Service has been checking up on him and looking into available information about his gross receipts. The matter has hardly been as open to inspection as a goldfish bowl. The taxpayer has barricaded himself within the home that is his castle—as no doubt he had a right to do. The Government, with more doubtful propriety, has sat in surveillance on him with binoculars and other watchful devices even more reflective of current technological development. In effect, what has been going on are the

preliminaries to what both sides recognize to be a probable all-out war.

The Government took the first step over the boundary of peaceful activity by making what this Court and the Court of Appeals have found to be an unlawful search and seizure of records kept within the house.

Their blood up from the first fray, the agents of the Internal Revenue Service were none too pleased to be brought into Court and held to account. I trust I shall not be misunderstood when I say that the Internal Revenue agents select cases on the theory that they have not merely the general capacity to know when tax evasions are serious, but also the special competence to single out what kinds of offenders ought to be punished. After all, we all know that the Internal Revenue Service must choose its targets among thousands of tax violators and, in fact, does choose in the light of what is current policy in administrative circles.

When this Court found that the Internal Revenue agents had violated the law and directed that the improperly seized records were to be returned, the agents were, to say the least, not happy. The original appearance in this Court by counsel for the Government was, if not insolent, at least none too respectful. The brief filed following the Court's adverse decision and asking for reconsideration thereof, showed more than hurt feelings and came close to being worthy of a rebuke.

More than once the judges of a court have been indirectly reminded that they personally are taxpayers. No sophisticated person is unaware that even in this very Commonwealth the Internal Revenue Service has been in possession of facts with respect to public officials which it has presented or shelved in order to serve what can only be called political ends, be they high or low. And a judge who knows the score is aware that every time his decisions offend the Internal Revenue Service he is inviting a close inspection of his own returns. But I suppose that no one familiar with this Court believes that intimidation, direct or indirect, is effective.

In any event, this Court, having adhered to its own decision that the Internal Revenue agents had denied Lord's constitutional rights, and having been affirmed by the Court of Appeals, the Internal Revenue Service returned, or purported to return, to the taxpayer those documents which under the Order the authorities were bound to restore.

As permitted by the Court's Order, the Government then proceeded to carry out its tax investigation of McGarry using material which allegedly had not been acquired by the unlawful search and seizure and which allegedly had not been derived from clues consequent upon that unlawful search and seizure.

It is plain enough from what has been testified in this Court that McGarry's counsel and the counsel for the Internal Revenue Service were not congenial. Acrimony was translated into acerbity.

Curiously, and in a way that no one has bothered to explain to this Court, a former Internal Revenue Service agent, Young, disclosed to McGarry's lawyer that some of the material being used by the Government represented the results of the unlawful search and seizure which had been condemned by this Court. The record before me does not reveal whether Young left the Service voluntarily. However, there is no indication that anything could have been said against his character or his Governmental Service. While he was on the stand, though Government counsel had adequate opportunity to examine him, no question was put in which he was subjected to the slightest reproach.

Whatever may have been Young's experience and motivation, he disclosed what he knew. On the record as it stands before me, it would appear that Young is entitled to have echoed on his behalf the splendid tribute to Louis R. Glavis by Louis D. Brandeis:

> "The danger in America is not of insubordination, but is of too complacent obedience to the will of superiors. With this great Government building up, ever creating new functions * * * the one thing we need is

> men in subordinate places who will think for themselves and who will think and act in full recognition of their obligations as part of the governing body * * *. We want every man in the Service * * * to recognize that he is part of the governing body, and that on him rests responsibility within the limits of his employment just as much as upon the man on top * * * they cannot be worthy of the respect and admiration of the people unless they add to the virtue of obedience some other virtues—the virtues of manliness, of truth, of courage, of willingness to risk positions, of the [willingness to risk criticisms, of the] willingness to risk the misunderstanding that so often come when people do the heroic thing."

I believe what Young said, and, therefore, find it more probable than not that on at least the following specific matters agents of the Internal Revenue Service disobeyed the Order of this Court:

1. Defendant John B. Flattery, one of the agents of the Internal Revenue Service, who was directed by this Court to return McGarry's unlawfully seized records, and to suppress all data in connection with those records, in wilful defiance of this Court's order used a part of those records relating to AAA Vending Company to pursue a lead to Bay State Security Corporation, and another part of those records relating to "Ye Olde Brown Jug" to pursue a lead to S. D. Breen, an insurance broker, and to Curry's Woodworking Company.

2. Defendant John B. Flattery, acting through his subordinate, Robert M. Ferrick, who himself is not a defendant in wilful defiance of this Court's order used the cash receipts and disbursements book of "Ye Olde Brown Jug", (being part of the unlawfully seized records heretofore mentioned,) to pursue leads with respect to checks and other financial transactions.

No evidence was offered to show that in any respect whatsoever defendants Kelly, Calhoun, or McNally was involved in any violation of this Court's Order.

But Flattery's deliberate violation must be weighed against his and other Government agents' scrupulous compliance in other respects with the procedure required by my Order.

[2] I, therefore, conclude as a matter of law that while an Internal Revenue agent intended to step very close to defying the clear lines of my Order and indeed, in a few places, more probably than not, consciously walked over the border, this degree of defiance does not quite rise to the level of criminal contempt.

[3] Criminal contempt is a matter in which the complaining party has the burden of proving his case beyond a reasonable doubt. While I am persuaded that more probably than not Internal Revenue Agent Flattery in this case did wilfully act contrary to my Order in certain specific respects, I have just that margin of uncertainty which constitutes a reasonable doubt. Therefore, I acquit him, (as well of course as the defendants against whom no evidence was offered) of the charge made against him that he was in criminal contempt.

[4] So far as concerns the aspect of this case which involves civil contempt, the Court is in an anomalous position. No evidence whatsoever has been offered that the complaining party has sustained any damage which would appropriately give rise to a justified claim for economic compensation. Hence, there is wanting the foundation appropriate to allow a civil recovery. On that basis I dismiss the petition with respect to civil contempt as well as with respect to criminal contempt.

Nothing in this opinon relates to what, if any, effect these proceedings may have upon the propriety of any criminal indictment which may be returned, upon a motion to dismiss such indictment, or the conduct of a trial with respect to any indictment that may be presented. All such matters lie in the womb of time. If they emerge they must be drawn

by appropriate procedure to the attention of some judge who can then make any necessary decision. All that I need say is that I now disqualify myself from hearing any further matter with respect to any aspect of this case. The reasons for the disqualification seem to me evident in this Opinion.

Motions for contempt denied.

Donald R. LORD and Bernard G. McGarry, Sr.

v.

Alvin M. KELLEY, Robert J. Calhoun, John B. Flattery, Charles R. McNally, and Donald Young.

Civ. A. No. 63-932.

United States District Court
D. Massachusetts.

Nov. 19, 1963.

Lawrence F. O'Donnell and John Warren McGarry, Boston, Mass., for plaintiffs.

Murray Falk, Asst. U.S. Atty., W. Arthur Garrity, Jr., U.S. Atty., for defendants.

WYZANSKI, District Judge.

After being twice amended, the complaint in this case has become in effect principally, though not exclusively, a pre-indictment pleading under Federal Rule of Criminal Procedure 41(e) by Lord, as possessor, and by McGarry and other individuals, partnerships, and corporations listed in paragraph XIII of the complaint, as owners to return records seized from Lord, by Flattery and others, and to suppress the evidentiary use of those records in any federal criminal proceeding which may be undertaken against the complainants.

These are the underlying facts.

1. McGarry and others listed in paragraph XIII of the complaint (herein called the clients) entrusted their records to a father and son, the late Alfred H. Lord and the present plaintiff Donald R. Lord, both being independent professional accountants, to prepare their tax returns. There is no credible evidence that any client, expressly or impliedly, authorized either of the Lords to permit any agent of the Internal Revenue Service to examine or to take those records.

2. Flattery, a special agent of the Internal Revenue Service, signed a summons, dated April 18, 1962, addressed to Lord, requiring him to appear on April 30 at 55 Tremont St., Boston before Flattery to give testimony relating to the tax liability of Bernard G. and Marie G. McGarry, and to bring with him designated records of the clients. Without initially serving this summons, Flattery, with two other special agents, went to Lord's Dedham home which was also his office.

3. Flattery was a man of sufficient experience so that he knew that unless otherwise authorized by his principal, or unless otherwise directed by a judicial order, an accountant in private practice has an obligation not to turn over his principal's records to a third party. Nonetheless, Flattery, after informing Lord that it would be prudent for him to cooperate with the special agents unless he himself wished [to get into trouble, demanded the right] to take his clients' records to the offices of the Internal Revenue Service. Lord, after indicating that he lacked authority voluntarily to surrender the documents, complied with the demand because he feared that if he did not do so he himself, regardless of his innocence, would be investigated or subject to proceedings initiated by the government. His compliance was not voluntary, but responded to Flattery's threats.

4. When he turned the records over to Flattery, Lord asked for some evidence to show his clients that he had

yielded to compulsory process. Then, for the first time, Flattery served upon Lord the summons which, of course, was merely a command that at a date 12 days thereafter Lord should produce the records in Boston.

Upon the basis of the foregoing findings, this Court arrives at the following ultimate findings and conclusions.

[1] The Fourth Amendment to the United States Constitution guarantees "The right of the people to be secure in their * * * papers, and effects, against unreasonable searches and seizures." When a person complains of an unreasonable search, it does not follow automatically that this Court has jurisdiction to hear the case. Without examining all possible bases for jurisdiction, it is sufficient in the case at bar to cite Rule 41(e) of the Federal Rules of Criminal Procedure which provides that "A person aggrieved by an unlawful search and seizure may move the district court * * * for the return of the property and to suppress for the use as evidence anything so obtained * * *."

[2] It might be supposed that Rule 41(e) gives a federal court jurisdiction to hear an aggrieved person only if he has been indicted, and if his grievance is presented as an interlocutory matter in the course of a criminal proceeding prosecuted by the United States against him as a defendant. But it is plain that this is an incorrect supposition, and that even before he has been indicted an aggrieved person may invoke the jurisdiction of a district court under some circumstances. Di Bella v. United States, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614.

The first cases in which an aggrieved person was permitted to invoke the jurisdiction named the United States as the opposing party and involved an alleged unlawful seizure by a United States Attorney. Jurisdiction was sustained on the theory that the United States Attorney as a lawyer was an officer of the court subject to the inherent disciplinary power of any court of record. Go-Bart Importing Co. v. United States, 282 U.S. 344, 354-355, 51 S.Ct.

153, 75 L.Ed. 374; Austin v. United States, James E. Holshouser, 4th Cir., 297 F.2d 356; Grant v. United States, 2nd Cir., 282 F.2d 165, 168; Centracchio v. Garrity, 1st Cir., 198 F.2d 382, 386; United States v. Maresca, S.D.N.Y., 266 F. 713, 717. That exercise of jurisdiction was certainly, to say the least, anomalous. No Act of Congress specifically authorized the federal court to take jurisdiction. Grant v. United States, supra. There was no criminal or civil proceeding in which it could be an interlocutory stage. Centracchio v. United States, supra. The United States as a sovereign had not agreed to be sued. If the aggrevied person were successful, the propriety of a court restraining the United States, as distinguished from its officers, was not clearly established. And not everyone would agree that the prosecutor's unlawful seizure involved his conduct qua attorney and hence subjected him to a court's disciplinary power.

[3-5] Yet, whatever may be the theoretical difficulties, a district court at this late date must conclude that if the federal prosecutor unlawfully seizes property for use in a criminal prosecution, then even before an indictment is returned (that is, when the criminal prosecution is *in posse* but not *in esse*) the party aggrieved has an "independent" action. Di Bella v. United States, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614. Such an action is a civil matter and should be so docketed. United States v. Koenig, 5th Cir., 290 F.2d 166, 169; Centracchio v. Garrity, 1st Cir., 198 F.2d 382, 385. Cf. Bolger v. United States, et al., S.D.N.Y., 189 F.Supp. 237, 242. Yet it may not in all aspects be subject to the Federal Rules of Civil Procedure. Di Bella v. United States, 369 U.S. 121, 129, note 8, 82 S.Ct. 654, 7 L.Ed.2d 614. And the adjudication of the trial court is immunized from appellate review, not by statutory but by judicial exception. Di Bella v. United States, Ibid., particularly pp. 132-133 [pp. 132-133 of 369 U.S., pp. 660-661 of 82 S.Ct., 7 L.Ed.2d 614].

Perhaps it is not too late to suggest that the best way of beginning such an action is to name as the party respond-

ent the prosecutor and not the United States. See Go-Bart Importing Co. v. United States, 282 U.S. 344, 355, lines 8-10, 51 S.Ct. 153, 75 L.Ed. 374. At any rate if an injunction is to be issued, it would seem that it should bind only individuals and not the sovereign. But it cannot be denied that there are many cases where no such limitation appears to have been recognized.

[6, 7] It certainly is not inappropriate that the initial pleading should take the style of a "complaint" rather than a "motion". A "motion" inevitably suggests that there is already in being some case in the course of which the motion is pleaded as a second or later procedural step. The word "complaint" or "petition" is a more correct description of the opening gambit.

[8] But in the case at bar the difficulty jurisdictionally is that the complaint does not name the federal prosecutor, or even, as in some of the heretofore cited cases, the United States. The only respondents are federal enforcement agents of the Internal Revenue Service. They are not members of the bar of this Court and in that sense officers of this Court subject to its disciplinary power. Nor are the defendants subject to the control of the United States District Attorney. See Go-Bart Importing Co. v. United States, 282 U.S. 344, 354, last 2 lines, 51 S.Ct. 153, 75 L.Ed. 374.

It might have been thought better not to embrace within the anomalous jurisdiction just described any alleged unlawful seizures by federal enforcement officers. Perhaps against them could be invoked some statutory basis of federal jurisdiction (see Cleary v. Bolger, 371 U.S. 392, 396, footnote 7, 414, footnote 3, 83 S.Ct. 385, 9 L.Ed.2d 390); or it might be sufficient for the aggrieved person to be left with an objection to the introduction of the seized property or its fruits in evidence in any administrative, civil, or criminal trial.

However, it seems to this Court that the Supreme Court either has extended or will extend the anomalous jurisdic-

tion so as to reach unlawful seizures by a federal agent connected with the enforcement of law, who should have observed "standards for law enforcement" established by "the federal Rules governing searches and seizures." Rea v. United States, 350 U.S. 214, 217-218, 76 S.Ct. 292, 294, 100 L.Ed. 233 (federal narcotics agent); Bolger v. Cleary, 2nd Cir., 293 F.2d 368, 369 (interpretation by Clark C. J., of Rea). See, however, the diverse views of Harlan J. and Brennan J. in Cleary v. Bolger, 371 U.S. 392, 396-398, 414, 83 S.Ct. 385, 9 L.Ed.2d 390. Compare Note, 76 Harv.L.Rev. 1656, 1664-1666; Note 77 Harv.L.Rev. 62, 149-152. In Rea after a defendant had successfully moved in a federal court for the return and suppression of evidence, that court, in connection with a contemptuous defiance of that order, was held to have jurisdiction to enjoin a specific federal enforcement agent from using "his illegal search and seizure as the basis of testimony in the state court." Rea v. United States, 350 U.S. 214, 217, 76 S.Ct. 292, 294, 100 L.Ed. 233. That holding may be viewed narrowly, as Justice Harlan and the Harvard Law Review notes suggest, or may be broadly applied as Justice Brennan and Judge Charles E. Clark agreed in upholding Judge Frederick van Pelt Bryan's judgment in Bolger v. United States of America, Robert G. Anderson, Secretary of the Treasury of the United States of America, Customs Agents William J. O'Shea and Thomas F. Loughman, Customs Enforcement Officers Walter J. Conlon and Joseph E. Patterson and Dorothy T. Zecha, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port of New York and Michael Cleary, S.D.N.Y., 189 F.Supp. 237, 242 (customs agents). To this Court, the indications are that the Supreme Court intends that where a federal criminal prosecution is probable a federal trial court shall have non-statutory jurisdiction to enjoin federal enforcement officers from holding or using property they unlawfully seized.

[9] Such non-statutory jurisdiction must be exercised subject to equitable principles. Centracchio v. Garrity, 1st

Cir., 198 F.2d 382. Often—perhaps usually—it will be more prudent for a trial court to await the return of an indictment before granting any relief. For in many cases the trial court may not be persuaded that the substantial risk facing the aggrieved person is a criminal prosecution, as distinguished from an administrative or civil proceeding.

[10] Here, however, this Court is persuaded that indictment is probable, and that jurisdiction should be exercised.

[11, 12] Moreover, not merely McGarry and the other clients, but the younger Lord have a standing to bring a complaint. The clients owned the records and obviously had an immediate interest. Lord, as their possessor, also had an interest judicially recognized. Jones v. United States, 362 U.S. 257, 267, 80 S.Ct. 725, 4 L.Ed.2d 697.

Jurisdiction and standing to sue being found to exist, it is appropriate to turn to the merits.

In the instant case no adequate basis for the seizure of the clients' records existed. There was no search warrant. The summons does not purport to be a warrant or its equivalent; and in any event it only commands Lord to bring the records with him to another city 12 days later than the date the records were seized. There is no statutory or common law authority under which Flattery claims, or ever did claim, the right to seize the records. There was no arrest to which the seizure could be incidental. Nor was consent effectively given to the taking of those records.

If it were necessary to decide the point, this Court would hold that Lord himself never gave consent. Intimidated by Flattery's statements and implied threats, Lord did not regard himself as having a free choice whether to allow Flattery to remove the records. When a special agent of the Internal Revenue Service tells an accountant who, so far as appears, is quite innocent of wrongdoing, that unless he turns over his clients' records and cooperates with the Internal Revenue Service the accountant will be in trouble. the agent is close to extortion. That Flattery did exercise unlawful pressure is proved by Lord's credible testimony.

[13] But even if Lord had freely consented to allow Flattery to remove the records, that consent would have been of no significance. Lord was an agent to whom the clients had entrusted their records for the sole purpose of preparing their tax returns. He lacked, and Flattery, as an experienced special agent familiar with the usual scope of an accountant's authority, could infer that Lord had not been given, express or implied power to deliver those records to third persons. Indeed Lord initially told Flattery that he had no authority from his clients to hand over documents. Yet, with this awarness, Flattery induced Lord in breach of his duty to his principals to deliver to the Internal Revenue Service their records.

[14] Even if Flattery had not known of the limitation on Lord's authority, inasmuch as the delivery by Lord on Flattery's demand was beyond the scope of Lord's actual or apparent authority, such delivery was without the consent of the clients and the taking by Flattery constituted an unlawful seizure violative of the clients' rights under the Fourth Amendment. United States v. Lagow, S.D.N.Y., 66 F.Supp. 738, aff'd 2nd Cir., 159 F.2d 245. See cases collected in Note 31 A.L.R. (2d) 1088, 1091 and in Note 221 to U.S. C.A. reprint of U.S. Constitution, Amendment 4.

[15] *A fortiori,* inasmuch as Flattery was aware of the limitation of Lord's authority, Flattery's conduct amounted to a tortious conversion of the client's records and a tortious inducement of breach of confidential contractual relations between the clients and the accountant, Union Old Lowell Nat. Bank v. Paine, 318 Mass. 313, 325, 61 N.E.2d 666; Restatement, Agency, 2nd, § 312, comments c and d, § 395. Hence, on that further ground, Flattery's acquisition of the clients' records was an unlawful seizure violative of the clients' rights under the Fourth Amendment.

Defendants make much of the asserted relevance of their statutory right as delegates of the Secretary of the Treasury "[t]o examine any books * * * material to such inquiry"

in a tax matter. 26 U.S.C. § 7602. No doubt, by proper application to a Court of competent jurisdiction, the agents of the Internal Revenue Service could have that right enforced, even if the taxpayers' or clients' records were in the hands of an accountant. But here the suggestion is that unarmed with any judicial or administrative order, without the consent of a taxpayer, and without giving him a chance to be heard, an Internal Revenue Service agent may examine any of the taxpayer's records, even those in the hands of an independent professional agent for a limited purpose. There is no need for this Court to rule upon that suggestion in the case at bar, for here the complaint is not against looking at the records before taking them, but at taking them and then looking.

The seizures having been unlawful, this Court must grant the prayer that there shall be returned to the clients, or, rather, their agent, Lord, their records. But it does not automatically follow that it is appropriate for this Court to suppress the use of these reocrds in evidence at any future criminal or other trial.

It is to be recalled that Flattery knew of these records before they were delivered to him. More significantly, he had already signed a summons covering those records. Had he waited patiently, the records, no doubt, would have been produced in response either to the administrative summons or to a judicial order enforcing such administrative summons—for it is difficult to imagine any excuse for nonproduction of records so obviously relevant to a standard administrative procedure.

[16] The only ground for suppressing the use of these records in evidence is not to allow the Government to gain advantage from violating the Bill of Rights and those high standards of fair play which should govern men entrusted with official power. The owner of the records is entitled to be as well off as if Flattery had not unlawfully seized those papers, but he is not entitled to be any better off. He is not

entitled to gain perpetual immunity from ever responding, in any future criminal proceeding or civil suit or administrative, tax inquiry, to an appropriate summons to produce those records which the tax statute require him to keep and which before the unlawful seizure the Government knew he had.

[17] If it be argued that the Internal Revenue Service should be taught a lesson and penalized for Flattery's misconduct, there are many answers, of which the best is that exclusionary rules of evidence are designed not as punishment but to prevent the public prosecutor from using "dirty hands" to achieve a conviction. Moreover, Flattery has acknowledged his error in open court, and it is unlikely that, at least in this District, Internal Revenue Service special agents will soon again, without a warrant, subpoena, or summons, take from accountants their clients' records unless the Internal Revenue Service has proof that the accountants are acting with the express or implied authority of their principals.

[18] So that the complainants may be as well off as, but not better off than, before the unlawful seizures, this Court's order will enjoin any defendant or any federal agent in concert with him from using in any proceeding, criminal, civil, or administrative, federal or state, information or clues derived from the records while Flattery and his associates in the Internal Revenue Service were holding them. Cf. Rea v. United States, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233. But nothing in that injunction shall preclude the United States or its agents from requiring, by appropriate warrant, subpoena, summons, or other due process of law, a complainant to produce any record covered by the summons which Flattery signed before he made the unlawful seizure, or shall preclude the United States or its agents from using the contents of or clues furnished by a production later than November 19, 1963. If it be said that this Court's order calls to mind Southey's poem on the Battle of Blenheim, the only response is that while the complainants may be

disappointed that they have not won immunity, they have vindicated the right of an independent accountant's clients not to have their papers taken by arbitrary, high-handed methods of tax enforcement.

[19] This Court will not grant so much of the complainants' prayer as seeks to suppress oral statements alleged to have been made by Lord at the time Flattery examined and seized the records or at other times. No adequate evidence of any such oral statements was offered. Nor is it clear that the clients have such an interest in those statements as to give them a *locus standi.* Lord himself might have a standing to be heard. See Judge Learned Hand in In re Fried, 2nd Cir., 161 F.2d 453, 465, 1 A.L.R. 2d 996. But the jurisdiction of this Court to enjoin the use of a coerced statement, were its existence adequately proved, is a subject not free from doubt. See Frankfurter J., in Di Bella v. United States, 369 U.S. 121, 128, 82 S.Ct. 654, 7 L.Ed.2d 614. In this circuit equitable jurisdiction, at least, has been denied. Centracchio v. Garrity, 1st Cir., 198 F.2d 382, 386-389. Accord. Benes v. Canary, 6th Cir., 224 F.2d 470. Elsewhere even federal jurisdiction has been questioned. See Harlan J. in Cleary v. Bolger, 371 U.S. 392, 396, footnote 7, 398-399, 83 S.Ct. 385, 9 L.Ed.2d 390; and Friendly J. in Grant v. United States, 2nd Cir., 282 F.2d 165, 168, col. 2. But those authorities may not represent the views of the Supreme Court today. See Brennan J. in Cleary v. Bolger, 371 U.S. 392, 414, footnote 3, 83 S.Ct. 385, 9 L.Ed.2d 390.

So much of the complaint granted as prays for the return of complainants' records to Lord, and for the suppression from use in evidence by the Government of any information or clues gathered while those records were in the Government's custody, without prejudice to the right of the Government hereafter to proceed by warrant, summons, or other due process to require complainants to produce the records covered by Flattery's subpoena.